CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 535

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 29, 1940

CERTIORARI GRANTED DECEMBER 9, 1940

BLANK PAGE

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,300

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., APPELLEES.

No. 11,301

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 21, 1939.

INDEX.

	Original	Print
Petition in Case No. 459	1	1
Exhibit A, Description of land of Chicago, Milwaukee, St. Paul and Pacific Railroad Company needed in connection with Lock and Dam No. 5, Mississippi River, in Winona County, Minnesota	7	6
Exhibit B, Statement as to persons owning, occupying, etc., lands mentioned in Exhibit A	9	6
Petition in Case No. 461	11	8
Exhibit A, Description of land of Chicago, Milwaukee, St. Paul and Pacific Railroad Company needed in connection with Lock and Dam No. 5, Mississippi River, in Wabasha County, Minnesota	17	13
Exhibit B, Statement as to persons owning, occupying, etc., lands mentioned in Exhibit A	17	14
Order amending Petition in Case No. 459	19	15
Order amending Petition in Case No. 461	21	16
Order granting Condemnation and appointing Commissioners in Case No. 459	23	17
Order granting Condemnation and appointing Commissioners in Case No. 461	27	20
Order granting United States immediate possession of lands described in Petition in Case No. 459	29	23
Order granting United States immediate possession of lands described in Petition in Case No. 461	31	25
Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph and Cable Company in Case No. 459	33	26
Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph and Cable Company in Cases Nos. 460 and 461	39	32
Notice of Appeal by United States from further report and award of Commissioners in Case No. 459	44	36
Notice of Appeal by United States from further report and award of Commissioners in Cases Nos. 460 and 461	46	39
Verdict in Cases Nos. 407, 459, 460 and 461	48	41
Stipulation with reference to division of Verdict and form of entry of Judgment	49	42
Judgment, January 6, 1936	53	45
Notice of Appeal by United States in Case No. 459	57	49
Recital of mailing of copies to attorneys	57	50
Notice of Appeal by United States in Cases Nos. 460 and 461	59	51
Acceptance of Service	60	52
Petition for Appeal in Case No. 459	61	52
Order allowing Appeal	62	54
Petition for Appeal in Cases Nos. 460 and 461	63	54
Order allowing Appeal	64	56
Citation and Admission of Service in Case No. 459	66	57
Citation and Admission of Service in Cases Nos. 460 and 461	68	58
Assignment of Errors in Case No. 459	71	60
Assignment of Errors in Cases Nos. 460 and 461	80	70
Mandate of United States Circuit Court of Appeals directing dismissal of certain lands in Condemnation from Appeal in Case No. 459	91	80

	Original	Print
Mandate of United States Circuit Court of Appeals directing dismissal of certain lands in Condemnation from Appeal in Cases Nos. 460 and 461	95	84
Stipulation for preparation of single Bill of Exceptions and one Transcript on Appeals	99	88
Order of United States Circuit Court of Appeals for preparation of single Bill of Exceptions and one transcript on appeals	102	90
Bill of Exceptions	104	92
Notice of proposed Bill of Exceptions and Service	104	92
Caption	106	94
Testimony of Witnesses	106	95
Robert C. Johnson	106	95
Government's Exhibits 1, 2, 3 and 4, Maps portraying Properties involved in Suits, etc., Recital as to	107	96
Lawrence W. Palmquist	108	97
Railroad Exhibit 1, Flowage Map, Recital as to	109	97
Railroad Exhibit 2, Track Profile of Railroad between point 2.2 miles west of Weaver down to Dam and East as far as Whitman Siding, Recital as to	111	99
Summarized Statement of Portions of Evidence	124	111
Telegraph and Signal lines	128	114
Culverts and Bridges	131	117
Stipulation relating to Case No. 459	132	118
Exhibit A, Map showing location and extent of remedial works installed by Chicago, Milwaukee, St. Paul & Pacific Railroad Company in Winona County, Minnesota	134	121
Stipulation relating to Cases Nos. 460 and 461	134	123
Exhibit A, Map showing location and extent of remedial works installed by Chicago, Milwaukee, St. Paul & Pacific Railroad Company in Wabasha County, Minnesota	135	125
Opening Statement of Counsel for Condemnor	135	127
Further Testimony of Witnesses	149	140
Magnus P. Ekberg	149	140
Government's Exhibits	154	144
9, Map showing ordinary high water mark, etc., Recital as to	154	144
69, Letter, M. D. Rahme to Major C. S. Riche, December 17, 1909	157	147
70, Map showing proposed changes in alignment on River Division of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, etc	157	149
71, Letter, C. S. Riche to M. D. Rhame, December 24, 1909	158	151
Robert C. Johnson	158	151
Government's Exhibit 10, Flowage Map, Recital as to	159	152
Motion of Government for Order dismissing certain sections of railroad track in question	159	152
Motion of Government for directed verdict	160	153
Motion of Government for Order dismissing from Petition certain segments of right of way	160	153
Court's Instructions to Jury	163	155
Verdict	177	169

	Original	Print
Order settling Bill of Exceptions with Amendments	242	170
Order for transmission of certain exhibits to Appellate Court and that they need not be printed in record	243	171
Praecipe for Transcript	244	172
Clerk's Certificate to Transcript	247	174
Order of U. S. Circuit Court of Appeals denying Motion of Appellees for allowance of Supplemental Record from District Court	248	175
Order of U. S. Circuit Court of Appeals granting Motion to omit Government's Exhibits 1, 2, 3 and 9, and Railroad Exhibit 2 from printed record, and directing that copies of Railroad Exhibit 1 be inserted in seven copies of printed record, etc	249	176
Railroad Exhibit 1, Flowage Map on reduced scale	251	179
Order for omission of Government's Exhibit 10 from printed record	1	179-a
Stipulation to amend Transcript of Record	1a	180
Order of U. S. Circuit Court of Appeals for filing of Stipulation to amend Transcript of Record, for filing of Additional Record and printing thereof	5	182

	Page
Proceedings in U. S. C. C. A., Eighth Circuit	183
Appearances of counsel	183
Order of argument	187
Order of submission	188
Opinion, Sanborn, J	188
Judgment	198
Notice of motion for order staying mandates	199
Motion for order staying mandates	200
Affidavit of John J. Courtney	200
Order staying issuance of mandate	201
Clerk's certificate	201
Order allowing certiorari	203

[fol. 1]. (Petition in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 Acres)

(Lock and Dam No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain land in Winona County, Minnesota, containing 32 acres; the State of Minnesota, et al., Respondents.

To The Honorable, The District Court Above Named:

Your Petitioner, The United States Of America, in its sovereign capacity, hereby respectfully petitions your Honorable Court and alleges:

I.

That this proceeding is brought and instituted in its name and on its behalf by George F. Sullivan, United States Attorney for the District of Minnesota, and A. C. Wiprud and John J. Courtney, Special Assistants to the Attorney General, acting under instructions of your Petitioner's Attorney General and at the request and direction of your Petitioner's Secretary of War thereunto duly authorized by Acts of Congress of the United States, among those Acts being these hereinafter specifically referred to.

[fol. 2] II.

Your Petitioner further states that under and pursuant to an Act of Congress of the United States of America, approved April 24, 1888, entitled "An Act to Facilitate the Prosecution of Works Projected for Improvement of Rivers and Harbors," and an Act of Congress approved August 1, 1888, entitled "An Act to Authorize Condemnation of Lands for Sites for Public Buildings and other Purposes", also Act of Congress approved July 18, 1918, entitled "An Act Making Appropriation for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and an Act of Congress approved July 3, 1930, entitled "An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and Joint Resolution of Congress (Public Resolution No. 10-72d Congress, H. J. Res. 271) "Amending section 1 of the Act entitled 'An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes', approved July 3, 1930, relating to the Mississippi River between the mouth of the Illinois River and Minneapolis", approved February 24, 1932, and divers other Acts of Congress, your Petitioner's Secretary of War is authorized and directed to create a nine foot channel in the Mississippi River between the mouth of the Illinois River and the Twin City dam and to that end to construct, maintain and operate certain locks and dams.

III.

That your Petitioner's Secretary of War has heretofore acquired certain lands for the construction, maintenance and operation of a lock and dam in the Mississippi River in the vicinity of Minneiska, Winona County, Minnesota, commonly known and designated as Lock and Dam No. 5, extending across the Mississippi River; but other lands are required for that purpose and it is necessary that your Petitioner take, appropriate and condemn the lands described in the list marked Exhibit "A", which is hereto attached and hereby made a part hereof. That a map is [fol. 3] hereto attached marked Exhibit "C" and hereby made a part hereof, on which is shown the lands which are necessary and which your Petitioner desires to take, ap-

propriate and condemn, tinted in blue on said map; and the lands which your Petitioner desires to take, appropriate and condemn easements in, on and over for the full, complete and perpetual right, power and privilege to overflow are described at the bottom of page 5 of said Exhibit "A", and your Petitioner requires the right, power and privilege to cut, remove and dispose of all wood, timber and other natural and artificial projections or obstructions on said lands or in the slack-water pool to be created by said lock and dam or on the margin thereof, which in any way or at any time shall interfere with navigation or the use of the lands and pool for the maintenance and operation of said lock and dam, or tend to render said lock and dam or the pool created thereby inaccessible, unsafe or insanitary, together with the right to enter upon said lands from time to time, as occasion may require, for any of the purposes aforesaid.

IV.

That the said Secretary of War has made due effort to acquire by purchase from the persons owning, occupying, claiming or appearing by the public records or otherwise to have some right, title or interest in or to the several tracts or parcels of land herein described but has not been able to agree with said persons or some of them as to the purchase price thereof, and in cases where an agreement as to purchase price might or could be arrived at, the titles to such tracts are so defective as to require a condemnation proceeding to bring in all parties and persons unknown and obtain a good title to such tracts.

V.

That under and pursuant to an Act of Congress approved July 18, 1918, entitled "An Act making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for other Purposes", the said Secretary of War is authorized to take immediate possession of said lands and desires to take immediate possession, so that the work of construction may [fol. 4] be immediately proceeded with; that your Petitioner has commenced such construction.

VI.

That certain and adequate appropriations and provisions for just compensation for the lands herein sought to be

taken for the purposes aforesaid have been made, by an allotment and appropriation under the National Industrial Recovery Act approved June 16, 1933 (Public No. 67-73d Congress, H. R. 5755) and money for such compensation is now available.

VII.

That said lands are a part of the area to be overflowed when said lock and dam No. 5 shall be placed in operation. That pursuant to the objects, purposes and intent of the National Industrial Recovery Act approved June 16, 1933, it is [indispensible] for your Petitioner to have possession of said lands in order that they may be cleared and made suitable for flowage resulting from said dam and in order that immediate employment may be given and the distress and depression of unemployment relieved, all of which is in furtherance of the purposes of said act and the policy of your Petitioner.

VIII.

That the names of all persons shown by the public records or claiming to be the owners, or occupants of said lands, or claiming or known to your Petitioner to have any right, title, equity or interest therein, as near as Petitioner can ascertain are as shown by the list hereto attached and hereby made a part hereof marked Exhibit "B".

IX.

That your Petitioner by naming herein any person or persons as owners or otherwise interested does not admit or intend to admit that any person or persons so named have any right, title, estate or interest in or to the bed of the Mississippi River below ordinary high water mark, or the meander line, as against your Petitioner in the improvement of the navigation of said river.

[fol. 5] Wherefor Your Petitioner Prays for an Order and Decree of This Court:

1. That the use for said lands sought to be acquired herein is a public use;

2. That it is necessary for such use, to take, appropriate and condemn said lands and easements in lands.

3. That the Petitioner be given the right to take immediate possession thereof;

4. That three qualified, competent and disinterested persons be appointed as Commissioners to appraise the damages occasioned by such taking, appropriating and condemning, according to law.

5. That the time and place of the first meeting of said Commissioners be fixed and their compensation prescribed.

6. That the Court make such other orders and decrees and take such other action as may be necessary and proper fully to effect the objects and purposes of your Petitioner, that just compensation may be made to those entitled thereto by law for the aforesaid taking and appropriating.

7. That the Court grant such other and further relief to your Petitioner as the nature of the case may require and reserve the right to make all such further and other orders in the premises as may be proper.

THE UNITED STATES OF AMERICA,
By Geo. F. Sullivan,
United States Attorney for the District of Minnesota.

JOHN J. COURTNEY,
Special Assistant to the Attorney General.
216 Federal Building,
St. Paul, Minnesota.

[fol. 6] State of Minnesota,
County of Ramsey—ss.:

John J. Courtney, being duly sworn, says that he is a Special Assistant to the Attorney General for the United States of America; that the foregoing Petition is true of his own knowledge except those matters therein stated on information and belief and as to those he believes it to be true.

JOHN J. COURTNEY.

Subscribed and sworn to before me this 30th day of December, 1933.

(Seal) FLORENCE WILSON,
Notary Public, Ramsey County, Minn.

My Commission expires April 16, 1938.

[fol. 7] Exhibit "A".

Lock and Dam No. 5, Mississippi River

Acquisition of Lands and Flowage Easements

Description of Tracts

In

Winona County, Minnesota.

* * * * * * * *

[fol. 8] Chicago, Milwaukee, St. Paul & Pacific Railroad Co.
(right-of-way)

The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul and Pacific Railroad right-of-way up to an elevation of 663 feet above mean sea level datum (1912 adjustment) as said right-of-way is now laid out and operated over, across and through the following parcels of land, viz.:

	5th P. M.
Lot 4	Sec. 17, T. 108 N., R. 8 W.
Lot 1	Sec. 18, T. 108 N., R. 8 W.
Lots 1, 2 & 3	Sec. 7, T. 108 N., R. 8 W.
Lots 1, & 2	Sec. 12, T. 108 N., R. 9 W.
Lots 1, 2 & 3	Sec. 1, T. 108 N., R. 9 W.
Lot 1	Sec. 2, T. 108 N., R. 9 W.

* * * * * * * *

[fol. 9] Exhibit "B".

Persons Owning, Occupying, Claiming or Appearing by the Public Records or Otherwise to Have Some Right, Title or Interest in or to the Lands in Winona County, Minnesota, Described in Exhibit "A":

(L/D #5, Second Condemnation, Winona County, Minnesota)

As To
Tracts:

* * * * * * * *

[fol. 10] Wi-Easements:

As to Railroad Property:

Chicago, Milwaukee & St. Paul Railway Company;

Chicago, Milwaukee, St. Paul and Pacific Railway Company;

United States Trust Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, as trustee under that certain trust deed dated May 1, 1889;

United States Mortgage and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and Calvert Brewer, as trustees of record under that certain trust deed or mortgage dated February 2, 1925;

Chemical Bank and Trust Company, a New York corporation
and
Howard B. Smith, of Montclair, New Jersey, as successor trustees under that certain trust deed or mortgage dated February 2, 1925;

Guaranty Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York,
and
Merrel P. Callaway, as trustees under that certain trust deed or mortgage dated February 2, 1925;

The National City Bank of New York, a national banking association organized and existing under and by virtue of the laws of the United States of America,
and
William W. Hoffman, of New York City, New York, as trustees under that certain mortgage or trust deed dated February 2, 1925.

(Endorsed—Petition 459) Filed December 30, 1933. Margaret L. Mullane, Clerk.

[fol. 11] (Petition in Case No. 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)

(Lock and Dam No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 461. vs. At Law.

Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al., Respondents.

To The Honorable, The District Court Above Named:

Your Petitioner, The United States of America, in its sovereign capacity, hereby respectfully petitions your Honorable Court and alleges:

I.

That this proceeding is brought and instituted in its name and on its behalf by George F. Sullivan, United States Attorney for the District of Minnesota, and A. C. Wiprud and John J. Courtney, Special Assistants to the Attorney General, acting under instructions of your Petitioner's Attorney General and at the request and direction of your Petitioner's Secretary of War thereunto duly authorized by Acts of Congress of the United States, among those Acts being those hereinafter specifically referred to.

II.

Your Petitioner further states that under and pursuant to an Act of Congress of the United States of America, approved April 24, 1888, entitled "An Act to Facilitate the Prosecution of Works Projected for Improvement of Rivers and Harbors", and an Act of Congress approved

August 1, 1888, entitled "An Act to Authorize Condemnation of Lands for Sites for Public Buildings and other [fol. 12] Purposes"; also Act of Congress approved July 18, 1918, entitled "An Act Making Appropriation for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and an Act of Congess approved July 3, 1930, entitled "An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and Joint Resolution of Congress (Public Resolution No. 10-72d Congress, H. J. Res. 271) "Amending Section 1 of the Act entitled 'An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes', approved July 3, 1930, relating to the Mississippi River between the mouth of the Illinois River and Minneapolis", approved February 24, 1932, and divers other Acts of Congress, your Petitioner's Secretary of War is authorized and directed to create a nine-foot channel in the Mississippi River between the mouth of the Iilinois River and The Twin City dam and to that end to construct, maintain and operate certain locks and dams.

III.

That your Petitioner's Secretary of War has heretofore acquired certain lands for the construction, maintenance and operation of a lock and dam in the Mississippi River in the vicinity of Minneiska, Minnesota, commonly known and designated as Lock and Dam No. 5, extending across the Mississippi River; but other lands are required for that purpose and it is necessary that your Petitioner take, appropriate and condemn the lands described in the list marked Exhibit "A", which is hereto attached and hereby made a part hereof. That it is likewise necessary that your Petitioner take, appropriate and condemn easements in lands described in said Exhibit "A", on pages 9, 10 and 11, consisting of the full, complete and perpetual right, power and privilege to overflow the same up to an elevation of 663 feet above mean sea level datum, as more particularly described in said Exhibit "A", together with the right, power and privilege to cut, remove and dispose of all wood, timber and other natural and artificial projections or ob-

structions on said lands, or in the slack-water pool to be created by said lock and dam or on the margin thereof, which in any way or at any time shall interfere with navigation or the use of the lands and pool for the maintenance and operation of said lock and dam, or tend to render said [fol. 13] lock and dam or the pool created thereby, inaccessible, unsafe or insanitary, together with the right to enter upon said lands from time to time, as occasion may require for any of the purposes aforesaid.

IV.

That the said Secretary of War has made due effort to acquire by purchase from the persons owning, occupying, claiming or appearing by the public records or otherwise to have some right, title or interest in or to the several tracts or parcels of land herein described but has not been able to agree with said persons or some of them as to the purchase price thereof, and in cases where an agreement as to the purchase price might or could be arrived at, the titles to such tracts are so defective as to require a condemnation proceeding to bring in all parties and persons unknown and obtain a good title to such tracts.

V.

That under and pursuant to an Act of Congress approved July 18, 1918, entitled "An Act making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for other Purposes", the said Secretary of War is authorized to take immediate possession of said lands and desires so to do, so that the work of construction may be proceeded with that your Petitioner has commenced such construction.

VI.

That certain and adequate appropriation and provision for just compensation for the lands herein sought to be taken for the purposes aforesaid has been made, by an allotment and appropriation under the National Industrial Recovery Act approved June 16, 1933—(Public No. 67-73d Congress, H. R. 5755) and money for such compensation is now available.

VII.

That said lands are a part of the area to be overflowed when said Lock and Dam No. 5 shall be placed in operation. That pursuant to the objects, purposes and intent of the National Industrial Recovery Act approved June 16, 1933, it is [indispensible] for your Petitioner to have possession of said lands in order that they may be cleared and made suitable for flowage resulting from said dam and in order that immediate employment may be given and the distress and depression of unemployment relieved, all of [fol. 14] which is in furtherance of the purposes of said act and the policy of your Petitioner.

VIII.

That the names of all persons shown by the public records or claiming to be the owners, or occupants of said lands, or claiming or known to your Petitioner to have any right, title, equity or interest therein, or in some part thereof, as near as Petitioner can ascertain are as shown on schedule attached and hereby made a part hereof marked Exhibit "B".

IX.

That hereto attached and hereby made a part hereof are two maps of the area to be affected by the operation of said Lock and Dam No. 5. That the lands which it is necessary for your Petitioner to take, appropriate and condemn, as aforesaid, are shown tinted in blue on said maps. That the easements which it is necessary for your Petitioner to take, appropriate and condemn, as aforesaid, are outlined in red on said maps. All of said lands and easements in lands are more particularly described in said Exhibit "A".

X.

That your Petitioner by naming herein any person or persons as owners or otherwise interested does not admit or intend to admit that any person or persons so named have any right, title, estate or interest in or to the bed of the Mississippi River below ordinary high water mark, or the meander line, as against your Petitioner in the improvement of the navigation of said river.

Wherefor Your Petitioner Prays for an Order and Decree of This Court:

1. That the use for said lands sought to be acquired herein is a public use;

2. That it is necessary for such use, to take, appropriate and condemn said lands and easements in lands.

3. That the Petitioner be given the right to take immediate possession thereof;

4 That three qualified, competent and disinterested persons be appointed as Commissioners to appraise the damages occasioned by such taking, appropriating and condemning according to law.

5. That the time and place of the first meeting of said Commissioners be fixed and their compensation prescribed.

[fol. 15] 6. That the Court make such other orders and decrees and take such other action as may be necessary and proper fully to effect the objects and purposes of your Petitioner, that just compensation may be made to those entitled thereto by law for the aforesaid taking and appropriating;

7. That the Court grant such other and further relief to your Petitioner as the nature of the case may require and reserve the right to make all such further and other orders in the premises as may be proper.

THE UNITED STATES OF AMERICA,
By Geo. F. Sullivan,
United States Attorney for the District of Minnesota.

JOHN J. COURTNEY,
Special Assistant to the Attorney General,
216 Federal Building,
St. Paul, Minnesota.

[fol. 16] State of Minnesota,
County of Ramsey—ss.

John J. Courtney, being duly sworn, says that he is a Special Assistant to the Attorney General for the United States of America; that the foregoing Petition is true of his own knowledge except as to those matters therein

stated on information and belief and as to those matters he believes it to be true.

JOHN J. COURTNEY.

Subscribed and sworn to before me this 30 day of December, 1933.

(Notarial Seal) FLORENCE WILSON,
Notary Public, Ramsey County, Minn.

My commission expires April 16, 1938.

[fol. 17] Exhibit "A".

Lock and Dam No. 5, Mississippi River

Wabasha County, Minnesota

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

(right-of-way)

The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul and Pacific Railroad Company right-of-way, up to an elevation of 663 feet above mean sea level datum (1912 adjustment), as said right-of-way is laid out and operated over, across and through the following parcels of land, viz.:

	5th P. M.
Lot 1	Sec. 35, T. 109 N., R. 9 W.
SW¼ of the NW¼, Lots 3, 4 and 5	Sec. 34, T. 109 N., R. 9 W.
SE¼ of the NE¼, SW¼ of the NE¼, SE¼ of the NW¼, SW¼ of the NW¼ and NW¼ of the NW¼	Sec. 33, T. 109 N., R. 9 W.
NE¼ of the NE¼, NW¼ of the NE¼ and NE¼ of the NW¼	Sec. 32, T. 109 N., R. 9 W.
SE¼ of the SW¼, NE¼ of the SW¼ and NW¼ of the SW¼	Sec. 29, T. 109 N., R. 9 W.
NW¼ of the NW¼	Sec. 29, T. 109 N., R. 9 W.
NE¼ of the NE¼	Sec. 30, T. 109 N., R. 9 W.
SE¼ of the SE¼ and SW¼ of the SE¼	Sec. 19, T. 109 N., R. 9 W.

Exhibit "B".

Lock and Dam No. 5, Mississippi River

Wabasha County, Minnesota

Wa- Easements:

As to Railroad Rights-of-Way:

Chicago, Milwaukee & St. Paul Railway Company;

Chicago, Milwaukee, St. Paul & Pacific Railway Company:

United States Trust Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, as trustee, under that certain trust deed dated May 1, 1889;

United States Mortgage and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and Calvert Brewer, as trustees of record under that certain trust deed or mortgage dated February 2, 1925;

Chemical Bank and Trust Company, a New York corporation
and
Howard B. Smith, of Montclair, New Jersey, as successor trustees under that certain trust deed or mortgage dated February 2, 1925;

Guaranty Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York,
and
Merrel P. Callaway, as trustees under that certain trust [fol. 18] deed or mortgage dated February 2, 1925;

The National City Bank of New York, a national banking association organized and existing under and by virtue of the laws of the United States of America,
and
William W. Hoffman, of New York City, New York, as trustees under that certain mortgage or trust deed dated February 2, 1925.

(Endorsed—Petition 461) Filed December 30, 1933. Margaret L. Mullane, Clerk.

[fol. 19] (Order Amending Petition in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota, containing 32 acres; the State of Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Lands Situate Along the Mississippi River in the County of Winona, State of Minnesota, which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

On motion of the Petitioner made in open Court, and upon all the files, records and proceedings herein,

It Is Hereby Ordered that the Petition heretofore filed herein may be and it is hereby amended in the following particulars, to-wit:—by deleting, wheresoever the same appears on page 5 of Exhibit "A", attached to the Petition herein, the figures "663" and by inserting in lieu and in place thereof the figures "660", as the same relates to the elevation above mean sea level datum (1912 adjustment), of the easements sought on the rights-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and over the highway of the State of Minnesota, so that the [fol. 20] easements sought in this proceeding shall be to an elevation of 660 feet above mean sea level datum (1912 ad-

justment) over said easements, and each of them, instead of to an elevation of 663 feet.

Dated this 28th day of February, 1934.

MATTHEW M. JOYCE,
Judge.

(Endorsed—Order Amending Petition 459) Filed February 28, 1934. Margaret L. Mullane, Clerk. By Joseph T. Lynch, Deputy.

[fol. 21] (Order Amending Petition in Case No. 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)
(L/D No. 5—Minneiska)

File No. 461 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Land Situate Along the Mississippi River in the County of Wabasha, State of Minnesota, which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

On motion of the Petitioner made in open Court, and upon all the files, records and proceedings herein,

It Is Hereby Ordered that the Petition heretofore filed herein may be and it is hereby amended in the following particulars, to-wit:—by deleting, wheresoever the same appear on pages 9, 10, and 11 of Exhibit "A", attached to the Petition, and substituting in lieu and in place thereof the figures "660", as the same relate to the elevation above mean sea level datum (1912 adjustment), of the easements sought in and over the rights-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Highway of the State of Minnesota, the Sand Prairie Road, the West Newton Chute Road, the streets, alleys and levees in the Village of Minneiska, Minnesota, and the streets and alleys in the Village of Weaver, Minnesota, so that the easements sought in this proceeding shall be to an elevation of 660 feet above mean sea level datum (1912 adjustment) over said easements, and each of them, instead of to an elevation of 663 feet.

Dated this 28th day of February, 1934.

MATTHEW M. JOYCE, Judge.

[fol. 22] (Endorsed—Order Amending Petition 461) Filed February 28, 1934, Margaret L. Mullane, Clerk. By Joseph T. Lynch, Deputy.

[fol. 23] (Order Granting Condemnation and Appointing Commissioners in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota, containing 32 acres; the State of Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Land Situate Along the Mississippi River, in the County of Winona, State of Minnesota, Which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

The above entitled matter came duly on for hearing before the undersigned, one of the Judges of the above named Court, at the Federal Court House, in the City of St. Paul, Minnesota, on Tuesday, February 27, 1934, pursuant to Notice of Presentation of Petition for the taking, appropriating and condemning of the lands therein described for public use in the improvement of navigation in the Mississippi River, on account of the construction, maintenance and operation of a lock and dam to be constructed in the Mississippi River in Winona County, to be commonly known and designated as Lock and Dam No. 5, and for an order appointing three Commissioners to appraise, ascertain and report the damages that may be caused to or sustained by the respective owners by or on account of the taking and condemning of said land.

[fol. 24] George F. Sullivan, United States Attorney for the District of Minnesota, Daniel F. Steck and John J. Courtney, Special Assistants to the Attorney General, appeared for the Petitioner. On behalf of the respondents the following appearances were made, viz.:—A. C. Erdall, on behalf of the Chicago, Milwaukee & St. Paul Railway; L. M. Montgomery, attorney pro se; and J. C. Carley, on behalf of Bottsford and Bauman.

It Appearing to the Court that said proceeding to condemn was duly brought and was authorized by the Congress of the United States as set out in said Petition; that the Petition herein was filed in the office of the Clerk of Court December 30, 1933; that notice of time and place of

presentation and hearing has been duly given and served on all parties interested in said lands and in this proceeding as by law directed, reference being made to the Return of the Marshal heretofore filed herein, and

The Court having heard the evidence adduced by the Petitioner in support of said Petition and duly considered the same, upon said evidence and upon all the files, records and proceedings in said matter, Finds:

That the use for which said lands described in said Petition are sought to be acquired herein is a public use, to-wit; the improvement of navigation in the Mississippi River; that the taking, appropriating and condemning thereof is necessary for such use and is authorized by law; that the possession of said lands is necessary and advantageous to the Petitioner for such use, and that certain and adequate provision has been made by the Petitioner for the compensation to be made for the property taken; Now Therefore,

It Is Hereby Ordered that the lands described in said Petition are hereby taken, appropriated and condemned for public use in the improvement of navigation on the Mississippi River; that fee simple title thereto is vested in the United States of America and that immediate possession [fol. 25] of said lands may be granted to the Petitioner herein upon petition therefor, notice whereof shall be served personally by mail at least eight (8) days in advance of the hearing on said application, and, upon those who cannot be found, by publication once in the America Herold at least eight (8) days in advance of said hearing.

It Is Hereby Further Ordered that the following named persons whose addresses are given below and who are competent, disinterested and qualified according to law be and hereby are appointed Commissioners to ascertain and report the compensation to be made by Petitioner for the lands so taken, appropriated and condemned, to the respective owners, occupants and persons having any interest in said lands, and to make report of the respective awards for said parcels to this Court, viz.:

P. H. Harrington Address Minneapolis, Minnesota

Harry D. Smith Address Plainview, Minnesota

J. L. Gangnagel. Address Wabasha, Minnesota

It Is Hereby Further Ordered that said Commissioners shall hold their first meeting at the hour of 10:00 A. M. on the 18 day of April, 1934, in the City of Wabasha, Wabasha County, Minnesota, and that after taking and subscribing the oath of office required by law, they immediately proceed to perform their duties as such Commissioners herein.

It Is Hereby Further Ordered that the compensation of said Commissioners be and is hereby fixed at the sum of. ($24.00) Dollars per day for each Commissioner while actually engaged in the performance of his duties under this Order.

MATTHEW M. JOYCE,
United States District Judge.

Dated this 13th day of April, 1934.

[fol. 26] (Endorsed—Order Granting Condemnation and Appointing Commissioners 459) Filed April 14, 1934, Margaret L. Mullane, Clerk, By Joseph T. Lynch, Deputy.

[fol. 27] (Order Granting Condemnation and Appointing Commissioners in Case No. 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of Certain Lands Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Mimesota,
Petitioner,
File No. 461. vs. At Law.
Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Land Situate Along the Mississippi River, in the County of Wabasha, State of Minnesota, Which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

The above entitled matter came duly on for hearing before the undersigned, one of the Judges of the above named Court, at the Federal Court House, in the City of St. Paul, Minnesota, on Tuesday, February 27, 1934, pursuant to Notice of Presentation of Petition for the taking, appropriating and condemning of the lands therein described for public use in the improvement of navigation on the Mississippi River, on account of the construction, maintenance and operation of a lock and dam to be constructed in the Mississippi River in Wabasha County, to be commonly known and desigated as Lock and Dam No. 5, and for an order appointing three Commissioners to appraise, ascertain and report the damages that may be caused to or sustained by the respective owners by or on account of the taking and condemning of said land.

George F. Sullivan, United States Attorney for the District of Minnesota, and John J. Courtney, Special Assistant to the Attorney General, appeared for the Petitioner. [fol. 28] On behalf of the respondents the following appearances were made, viz.:—A. C. Erdall, on behalf of Chicago, Milwaukee & St. Paul Railway; L. M. Montgomery, attorney pro se; J. C. Carley, on behalf of Bottsford and Bauman.

It Appearing to the Court that said proceeding to condemn was duly brought and was authorized by the Congress of the United States as set out in said Petition; that the Petition herein was filed in the office of the Clerk of Court December 30, 1933; that notice of time and place of presentation and hearing has been duly given and served on all parties interested in said lands and in this proceeding as by law directed, reference being made to the Return of the Marshal heretofore filed herein, and,

The Court having heard the evidence adduced by the Petitioner in support of said Petition and duly considered the same, upon said evidence and upon all the files, records and proceedings in said matter Finds:

That the use for which said lands described in said Petition are sought to be acquired herein is a public use to-wit:—the improvement of navigation in the Mississippi River; that the taking, appropriating and condemning thereof is necessary for such use and is authorized by law; that the possession of said lands is necessary and advantageous to the Petitioner for such use; and that certain and adequate provision has been made by the Petitioner for the compensation to be made for the property taken; Now Therefore,

It Is Hereby Ordered That the lands described in said Petition are hereby taken, appropriated and condemned for public use in the improvement of navigation on the Mississippi River; that fee simple title thereto is vested in the United States of America and that immediate possession of said lands may be granted to the Petitioner herein upon petition therefor, notice whereof shall be served personally, by mail at least eight (8) days in advance of the hearing on said application, and, upon those who cannot be found, by publication once in the Wabasha County Herald-Standard at least eight (8) days in advance of said hearing.

It Is Hereby Further Ordered that the following named persons whose addresses are given below and who are competent, disinterested and qualified according to law be and hereby are appointed Commissioners to ascertain and re-
[fol. 28a] port the compensation to be made by Petitioner for the lands so taken, appropriated and condemned, to the respective owners, occupants and persons having any interest in said lands, and to make report of the respective awards for said parcels to this Court, viz.:

P. H. Harrington	Address	Minneapolis, Minnesota
Harry D. Smith	"	Plainview, Minnesota
J. L. Gangnagel	"	Wabasha, Minnesota

It Is Hereby Further Ordered that said Commissioners shall hold their first meeting at the hour of 10:00 A. M. on the 18th day of April, 1934, in the City of Wabasha, Wa-

basha County, Minnesota, and that after taking and subscribing the oath of office required by law, they immediately proceed to perform their duties as such Commissioners herein.

It Is Hereby Ordered that the compensation of said Commissioners be and is hereby fixed at the sum of ($24.00) Dollars per day for each Commissioner while actually engaged in the performance of his duties under this Order.

MATTHEW M. JOYCE,
United States District Judge.

Dated this 13 day of April, 1934.

(Endorsed—Order Granting Condemnation and Appointing Commissioners 461) Filed April 14, 1934. Margaret L. Mullane, Clerk, Joseph T. Lynch, Deputy.

[fol. 29] (Order Granting United States Immediate Possession of Lands Described in Petition in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)

(L/D No. 5 Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain land in Winona County, Minnesota, containing 32 Acres; the State of Minnesota, et al., Respondents.

The above matter came duly on for hearing before this Court on Saturday, July 28, 1934, upon the petition of the United States of America for an order granting it immediate possession of the lands and easements described in the petition on file herein.

The Petitioner appeared by John J. Courtney, Special Assistant to the Attorney General.

Upon said petition and upon all the files, records and proceedings herein, and after hearing the evidence adduced by the Petitioner, it appearing that certain and adequate provision has been made for the payment of just compensation to the parties entitled thereto for the taking of said lands, and that the relief prayed for should be granted in the public interest,

It Is Ordered that the United States of America, Petitioner herein, be and it is hereby granted immediate possession of the lands and easements in lands described in the petition for condemnation herein and all thereof and it may take and go into immediate possession thereof accordingly.

It Is Further Ordered that the Petitioner herein, in the exercise of the right of immediate possession herein granted, for the purpose of clearing timber upon said land, [fol. 30] shall not interfere with growing crops of any of the respondents until the same shall have been harvested.

It Is Further Ordered and directed that the work done by the Petitioner herein, in the exercise of its right to possession, shall so conduct its operations as not to interfere with fences or gates or otherwise disturb the use of the lands for farming purposes during the agricultural season of 1934 to any greater extent than may be reasonably necessary for the execution of the work sought to be done by the United States of America in aid of navigation on the lands and easements in lands herein referred to.

Dated this 4th day of August, 1934.

MATTHEW M. JOYCE,
United States District Judge.

(Endorsed—Order for Immediate Possession 459) Filed August 4, 1934, Margaret L. Mullane, Clerk, By William H. Eckley, Deputy.

[fol. 31] (Order Granting United States Immediate Possession of Lands Described in Petition in Case No. 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)

(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 461. vs. At law.

Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al, Respondents.

The above matter came duly on for hearing before this Court on Saturday, July 28, 1934, upon the petition of the United States of America for an order granting it immediate possession of the lands and easements described in the petition on file herein.

The Petitioner appeared by John J. Courtney, Special Assistant to the Attorney General.

Upon said petition and upon all the files, records and proceedings herein, and after hearing the evidence adduced by the Petitioner, it appearing that certain and adequate provision has been made for the payment of just compensation to the parties entitled thereto for the taking of said lands, and that the relief prayed for should be granted in the public interest,

It Is Ordered that the United States of America, Petitioner herein, be and it is hereby granted immediate possession of the lands and easements in lands described in the petition for condemnation herein and all thereof and it may take and go into immediate possession thereof accordingly.

It Is Further Ordered that the Petitioner herein, in the exercise of the right of immediate possession herein granted, for the purpose of clearing timber upon said land, shall not interfere with growing crops of any of the respondents until the same shall have been harvested.

[fol. 32] It Is Further Ordered and directed that the work done by the Petitioner herein, in the exercise of its right to possession, shall so conduct its operations as not to interfere with fences or gates or otherwise disturb the use of the lands for farming purposes during the agricultural season of 1934 to any greater extent than may be reasonably necessary for the execution of the work sought to be done by the United States of America in aid of navigation on the lands and easements in lands herein referred to.

Dated this 4th day of August, 1934.

MATTHEW M. JOYCE,
United States District Judge.

(Endorsed—Order for Immediate Possession 461) Filed August 4, 1934, Margaret L. Mullane, Clerk, By William H. Eckley, Deputy.

[fol. 33] (Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph and Cable Company in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter particularly described, Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation)
(L/D No. 5-Minneiska)

File No. 459 At Law.

We, the undersigned, Commissioners appointed by the Court in this proceeding to ascertain and report the amount of damages sustained and the compensation due the owners

and persons interested in the tracts of land taken and condemned in this proceeding, and upon which land easements are being taken, do hereby report as respects the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al. for the taking, appropriation and condemnation by the petitioner of the easement hereinafter described and as respects the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company for the taking, appropriation and condemnation by the petitioner herein of the easements hereinafter described as follows:

We met at the time and place designated in the order of appointment, took and subscribed the oath of office and filed the same with the Clerk of the Court. P. H. Harrington was elected chairman and Harry D. Smith was elected secretary. The hearing on the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the joint claim of said Railroad Company and Western Union Telegraph and Cable Company was conducted separately from the hearings of other owners named in this condemnation proceeding. John J. Courtney, Special Assistant to the Attorney General, appeared on behalf of the petitioner and A. C. Erdall appeared on behalf of the said Railroad Company and said Telegraph Company.

[fol. 34] At our first meeting we fixed the time and place for viewing the premises and did view the premises with the representatives of each of the parties and of the petitioner.

We fixed the time and place for hearing the testimony of all of the parties interested and heard all the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner.

Now, therefore, having taken the oath, viewed the premises and heard the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner and having received the instructions of the Court and after listening to the arguments of counsel and having in all respects fully complied with the order of the Court and the law relating to this proceeding, we do hereby make and report our

award as to the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the sum of One Hundred Sixty-one Thousand One Hundred Thirty-Four and 23/100 ($161,134.23) Dollars, for the taking of an easement in and over the right of way and interests of said Railroad Company as the same is laid out and operated over and through the parcels of land more particularly described in the petition for condemnation herein and to and including a point within the limits of Winona County, Minnesota, which, by stipulation of the parties, is agreed to be a point on said right of way numbered railroad station 4818+45 and Government station 186+42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnation herein, reference being had thereto for particularity.

It was stipulated between the parties, and is so stipulated in this Report and Award, that the award to said Western Union Telegraph and Cable Company shall be and it hereby is merged in the claim of said Railroad Company for signal and telegraph lines and changes claimed to be necessary therein and that the award for such signal and tele-[fol. 35] graph changes shall be and it hereby is made jointly to said Railroad Company and the said Telegraph Company and that the said Railroad Company and Telegraph Company, after the making of such award, will make any necessary allocation or adjustments of amounts among themselves.

Upon such stipulation and upon the same showing as hereinbefore recited, we do hereby make and report and award jointly to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company in the sum of Seven Thousand One Hundred Forty-four and 06/100 ($7,144.06) Dollars, for the taking of an easement as described in the petition for condemnation herein in and over the right of way and interests of said Railroad Company as laid out and operated over and through the parcels of land more particularly described in the petition for condemnation herein, that is to say in Law Number 459 and to and including a point within the limits of Winona County, Minnesota, which by stipulation of the parties is agreed to be a point on said right of way railroad station numbered 4818+45 and Government sta-

tion 186+42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnation herein, reference being had thereto for particularity.

In arriving at the aforesaid award in favor of the said Chicago, Milwaukee, St. Paul and Pacific Railroad Company, we allowed for the respective items of claim the amount set opposite each item thereof as follows:

Item No. 1 — For riprap within the area not claimed by the Government to be an encroachment.	($71,533.00)
Item No. 2 — For bank widening within the area not claimed by the Government to be an encroachment.	($ None)
Item No. 3 — For raise in grade for the area not claimed by the Government to be an encroachment.	($ 235.00)
Item No. 4 — For culvert L-583.	($ None)
[fol. 36] Item No. 5 — For culvert L-567.	($ 285.00)
Item No. 6 — Culvert L-565.	($ 24.00)
Item No. 7 — Culvert L-551.	($ 38.00)
Item No. 8 — Culvert L-549.	($ None)
Item No. 9 — Culvert L-82½.	($ 70.00)
Item No. 10 — Culvert L-545½.	($ None)
Item No. 11 — For Bridge L-82.	($12,650.00)
Item No. 12 — For engineering and contingencies upon items numbered 1 to 11 inclusive above.	($ None)
Item No. 13 — For riprap within the 660 lineal feet of railroad between government stations 15+70 to 20+30 and/or railroad stations 4989+06.5 to 4982+56.5, claimed by the Government to be an encroachment.	($11,166.26)
Item No. 14 — For culvert L-527, situate within the limits of the stations described in Item No. 13 above and claimed by the Government to be an encroachment.	($ 3,383.00)

Item No. 15 —	For engineering and contingencies upon Items numbered 13 and 14 above.	($ 338.30)
Item No. 16 —	For riprap in the 1900 lineal feet claimed by the Government to be an encroachment between Government stations 36+50 to 55+50 and/or railroad stations 4968+36.5 to 4949+36.5.	($26,947.45)
Item No. 17 —	For bank widening within the area described at Item No. 16 above.	($ 1,824.50)
Item No. 18 —	For raise in grade within the area described in Item No. 16 above.	($ 5,463.90)
Item No. 19 —	For culvert L-80, situate within the limits of the stations recited in Item No. 16 above, and claimed by the Government to be an encroachment.	($20,777.00)
Item No. 20 —	For engineering and contingencies upon Items No. 16, 17, 18 and 19, above.	($ 2,806.55)
Item No. 21 —	For riprap between Government stations 70+80W to 74+30W, and/or railroad station 4930+36.5 to railroad station 4934+06.5, claimed by the Government to be an encroachment. (consisting of 350 lineal feet.	($ 1,887.05)
Item No. 22 —	For bank widening between the stations described in Item No. 21 above.	($ 423.10)

[fol. 37]

Item No. 23 —	For raise in grade between the stations described in Item No. 21 above.	($ 1,127.10)
Item No. 24 —	For engineering and contingencies upon Item No. 21 and 22 and 23 above.	($ 155.02)
	Total	$161,134.23

In arriving at the aforesaid joint award of the Chicago Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company on account of signal and telegraph changes claimed to be necessary, we allowed for the respective items of claim on the part of said Railroad Company and Telegraph Company the amount set opposite each item, as follows:

Item No. A —	For signal and telegraph line changes not located within any part of the area claimed by the Government to be an encroachment.	($ 6,037.88)

Item No. B —	For engineering and contingencies upon Item No. A above	($ None)
Item No. C —	For signal and telegraph changes within the area claimed by the Government to be an encroachment between stations 70+80W and 74+30W, and/or railroad stations 4930+56.5 to railroad station 4934+06.5, claimed by the Government to be an encroachment.	($ 133.38)
Item No. D —	For engineering and contingencies upon Item No. D above.	($ None)
Item No. E —	For signal and telegraph line changes between Government station 36+50W to Government station 55+50W, and/or railroad station 4949+36.5 to railroad station 4968+36.5, claimed by the Government to be an encroachment.	($ 722.00)
Item No. F —	For engineering and contingencies upon Item E above.	($ None)
Item No. G —	For signal and telegraph line changes between Government station 15+17W to Government Station 22+30W, and/or railroad station 4982+56.5 to railroad station 4989+16.5, claimed by the Government to be an encroachment.	($ 250.80)
[fol. 38] Item No. H. —	Engineering and contingencies upon Item No. G above.	($ None)
	Total	$ 7,144.06

We further find that the petitioner went into possession of said property by order of this Court on August 4, 1934, and we submit to the Court without passing thereupon the matter of the allowance of interest to the condemnees.

Dated at St. Paul, Minnesota, this 6th day of April, 1935.

P. H. HARRINGTON,
Chairman.

HARRY D. SMITH,
Secretary.

J. L. GANGNAGEL,
Commissioners.

Endorsed—Further Report and Award of Commissioners 459) Filed April 8, 1935, Margaret L. Mullane, Clerk.

[fol. 39] (Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph and Cable Company in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)
File No. 460 At Law.
File No. 461 At Law.

We, the undersigned, Commissioners appointed by the Court in this proceeding to ascertain and report the amount of damages sustained and the compensation due the owners and persons interested in the tracts of land taken and condemned in this proceeding, and upon which land easements are being taken, do hereby report as respects the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al, for the taking, appropriation and condemnation by the petitioner of the easement hereinafter described and as respects the claim of Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company for the taking, appropriation and condemnation by the petitioner herein of the easements hereinafter described as follows:

We met at the time and place designated in the order of appointment, took and subscribed the oath of office and filed the same with the Clerk of the Court. P. H. Harrington was elected chairman and Harry D. Smith was elected secretary. The hearing on the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the joint claim of said Railroad Company and Western Union

Telegraph and Cable Company was conducted separately from the hearings of other owners named in this condemnation proceeding. John J. Courtney, Special Assistant to the Attorney General, appeared on behalf of the petitioner and A. C. Erdall appeared on behalf of said Railroad Company and said Telegraph Company.

At our first meeting we fixed the time and place for viewing the premises and did view the premises with the representatives of each of the parties and of the petitioner.

[fol. 40] We fixed the time and place for hearing the testimony of all of the parties interested and heard all the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner.

Now, therefore, having taken the oath, viewed the premises and heard the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner and having received the instructions of the Court and after listening to the arguments of counsel and having in all respects fully complied with the order of the Court and the law relating to this proceeding, we do hereby make and report our award as to the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the sum of Seventy Eight Thousand Three Hundred Ninety One and no/100 ($78391.01) Dollars, for the taking of an easement in and over the right of way and interests of said Railroad Company as the same is laid out and operated over and through the parcels of land more particularly described in the petition for condemnation herein and to and including a point within the limits of Wabasha County, Minnesota, which, by stipulation of the parties, is agreed to be a point on said right of way numbered railroad station 4818+45 and Government station 186+42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnations herein, reference being had thereto for particularity.

By stipulation of the parties made during the hearing, and it is so stipulated herein, the easement recited in the

petitions for condemnation in Law Numbers 460 and 461 are hereby consolidated and this Report and Award is in full for both of the easements recited in both of said cases.

It was further stipulated and is so stipulated in this Report and Award by said Railroad Company and Telegraph Company and the petitioner that the award to said Western Union Telegraph and Cable Company shall be and it hereby is merged in the claim of said Railroad Company for signal and telegraph lines and changes claimed to be necessary therein and that the award for such signal and telegraph changes shall be and it hereby is made jointly to said Railroad Company and the said Telegraph Company and that the said Railroad Company and Telegraph Company, after the making of such award, will make any necessary allocation or adjustments of amounts among themselves.

[fol. 41] Upon such stipulation and upon the same showing as hereinbefore recited, we do hereby make and report and award jointly to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company in the sum of Thirty Six Hundred Ninety and 51/100 Dollars ($3690.51) Dollars, for the taking of an easement as described in the petitions for condemnation herein in and over the right of way and interests of said Railroad Company as laid out and operated over and through the parcels of land more particularly described in the petitions for condemnation herein, that is to say in Law Numbers 460 and 461 and to and including a point within the limits of Wabasha County, Minnesota, which by stipulation of the parties is agreed to be a point on said right of way railroad station numbered 4818+45 and Government station 186 + 42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnation herein, reference being had thereto for particularity.

In arriving at the aforesaid award in favor of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, we allowed for the respective items of claim the amounts set opposite each item thereof as follows:

Item No. 1 — For riprap within the area of this condemnation excepting therefrom riprap within the area claimed by the Government to be an encroachment.	($ 26549.13)
Item No. 2 — For bank widening within the area of this condemnation and excepting therefrom such portion as may lay within the area claimed to be an encroachment by the Government.	($ 4793.43)
Item No. 3 — For raise in grade for the area within this condemnation excepting such part as lays within the area claimed by the Government to be an encroachment.	($ 8294.65)
Item No. 4 — For culvert and bridge number L-90	($ 13654.00)
Item No. 5 — For smaller culverts not particularly identified and located without the limits of any claimed encroachment by the Government.	($ 759.00)
Item No. 6 — For engineering and contingencies upon the above numbered items.	($ None)
Item No. 7 — For riprap within the 870 lineal feet between Government stations 200 + 30 to 209 + 00, and railroad stations 4804 + 56.5 to station 4795 + 86.5, claimed by the Government to be an encroachment	($ None)
Item No. 8 — For culverts numbered 595 and 599, situate within the limits of the encroachment described in Item No. 7 above.	($ None)
Item No. 9 — For engineering and contingencies upon Item No. 7 above.	($ None)
[fol. 42] Item No. 10 — For engineering and contingencies upon Item No. 8 above.	($ None)
Item No. 11 — For culvert numbered L-84	($22,128.00)
Item No. 12 — For engineering and contingencies upon Item No. 11 above	($ 2,212.80)
Total	$78,391.01

In arriving at the aforesaid joint award in favor of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company on account of signal and telegraph changes, we allowed for the respective items of claim the amount set opposite each item thereof as follows:

Item No. A —	For signal and telegraph changes without the limits of any claimed encroachment by the Government	($ 3,690.56)
Item No. B —	For contingencies and engineering upon Item No. A above.	($ None)
Item No. C —	For signal and telegraph changes within the area claimed by the Government to be an encroachment and described above.	($ None)
Item No. D —	For contingencies and engineering on Item No. C above.	($ None)
	Total	$ 3,690.51

We further find that the Petitioner went into possession of said property by order of this Court on August 4, 1934, and we submit to the Court without passing thereupon the matter of the allowance of interest to the condemnees hereinbefore referred to.

Dated at St. Paul, Minnesota, this 6th day of April, 1935.

P. H. HARRINGTON,
Chairman.

HARRY D. SMITH,
Secretary.

J. L. GENGNAGEL,
Commissioners.

[fol. 43] (Endorsed—Further Report and Award of Commissioners 460-461) Filed April 8, 1935, Margaret L. Mullane, Clerk.

[fol. 44] Notice of Appeal from Further Report and Award of Commissioners as to Easements in and Over the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company Right-of-Way.

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—L/D #5, Minneiska)

File No. 459 At Law

United States of America, by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota, containing 32 Acres; the State of Minnesota, et al., Respondents.

To: The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company jointly, and to A. C. Erdall and F. W. Root, Attorneys for said Companies, and to all whom it may concern:

Please take notice that the United States of America, the Petitioner herein, hereby appeals to the above-named Court from the Further Report and Award made by P. H. Harrington, Harry D. Smith and J. L. Gangnagel, Commissioners appointed by the above-named Court, which said award was dated April 6, 1935 and filed with the Clerk of the above named Court in said Court on April 8, 1935, Notice of Filing of which was served on the Petitioner on April 16, 1935 and service of the Notice of the Filing of which was served upon the said Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph & Cable Company on April 17, 1935, all of which appears more particularly by the files, records and proceedings in this cause, awarding to the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the reputed owner of the lands and tracts of lands and easements hereinafter described, the sum of $161,134.23, and to the said [fol. 45] Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the said Western Union Telegraph & Cable Company, jointly, the sum of $7,144.06.

The lands and easements in lands to which this said appeal relates are described in the Petition for Condemnation as:

"The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul & Pacific Railroad right-of-way up to an elevation of 660 feet above mean sea level

datum (1912 adjustment) as said right-of-way is now laid out and operated over and across and through the following parcels of land, viz.:

Lot 4, Section 17, Township 108 N. Range 8 W., 5th P. M.

Lot 1, Sec. 18, Twp. 108 N. Range 8 W., 5th P. M.

Lots 1, 2 and 3, Sec. 17, Twp. 108 N. Range 8 W., 5th P. M.

Lots 1 and 2, Sec. 12, Twp. 108 N. Range 9 W., 5th P. M.

Lots 1, 2 and 3, Sec. 1, Twp. 108 N. Range 9 W., 5th P. M.

Lot 1, Sec. 2, Twp. 108 N. Range 9 W., 5th P. M.

all situate in the County of Winona, State of Minnesota."

Said appeal is taken upon the grounds first, that said award is excessive; second, that said award is not justified by the facts and that the evidence is not sufficient to sustain it; third, that said award was made under erroneous instructions from the Court, and fourth, that said award was arrived at by erroneous application of the law relating thereto by the Commissioners.

Dated at St. Paul, Minnesota, this 4th day of May, 1935.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota.
By John J. Courtney,
Special Assistant to the Attorney General.
214 Federal Courts Bldg.
St. Paul, Minnesota.

(Endorsed—Notice of Appeal from Further Report and Award of Commissioners 459) Filed May 4, 1935, Margaret L. Mullane, Clerk, By Catherine Murphy, Deputy.

[fol. 46] Notice of Appeal from Further Report and Award of Commissioners as to Easements in and Over the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company Right-of-Way.

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America, by Geo. F. Sullivan, U. S. Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Edward M. Davidshofer, et al.,

and vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minne., et al., Respondents.

To: The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company jointly, and to A. C. Erdall and F. W. Root, Attorneys for said Companies, and to all whom it may concern:

Please take notice that the United States of America, the Petitioner herein, hereby appeals to the above-named Court from the Further Report and Award made by P. H. Harrington, Harry D. Smith and J. L. Gengnagel, Commissioners appointed by the above-named Court, which said award was dated April 6, 1935 and filed with the Clerk of the above-named Court in said Court on April 8, 1935, No-

tice of Filing of which was served on the Petitioner on April 16, 1935 and service of the Notice of Filing of which was served upon the said Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph & Cable Company on April 17, 1935, all of which appears more particularly by the files, records and proceedings in this cause, awarding to the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the reputed owner of [fol. 47] the lands and [and] tracts of lands and easements hereinafter described, the sum of $78,391.01, and to the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the said Western Union Telegraph & Cable Company, jointly, the sum of $3,690.51.

The lands and easements in lands to which this said appeal relates are described in the Petition for Condemnation as:

"The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul & Pacific Railroad right-of-way up to elevation of 660 feet above mean sea level datum (1912 adjustment) as said right-of-way is now laid out and operated over and across and through the following parcels of land, viz.:

	5th P. M.
Lot 1	Sec. 35, T. 109 N., R. 9 W
SW¼ of the NW¼, Lots 3, 4 and 5	Sec. 34, T. 109 N., R. 9 W
SE¼ of the NE¼, SW¼ of the NE¼, SE¼ of the NW¼, SW¼ of the NW¼ and NW¼ of the NW¼	Sec. 33, T. 109 N., R. 9 W
NE¼ of the NE¼, NW¼ of the NE¼ and NE¼ of the NW¼	Sec. 32, T. 109 N., R. 9 W
SE¼ of the SW¼, NE¼ of the SW¼ and NW¼ of the SW¼	Sec. 29, T. 109 N., R. 9 W
NW¼ of the NW¼	Sec. 29, T. 109 N., R. 9 W
NE¼ of the NE¼	Sec. 30, T. 109 N., R. 9 W
SE¼ of the SE¼ and SW¼ of the SE¼	Sec. 19, T. 109 N., R. 9 W

all situate in the County of Wabasha, State of Minnesota."

as said tracts and easements are described in the Petitions for Condemnation in File Nos. Law 460 and 461.

Said appeal is taken upon the grounds first, that said award is excessive; second, that said award is not justified by the facts and that the evidence is not sufficient to sustain it; third, that said award was made under erroneous instructions from the Court, and fourth, that said award was arrived at by erroneous application of the law relating thereto by the Commissioners.

Dated at St. Paul, Minnesota, this 4th day of May, 1935.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota.
John J. Courtney,
Special Assistant to the Attorney General,
214 Federal Courts Bldg.,
St. Paul, Minnesota.

(Endorsed—Notice of Appeal from Further Report and Award of Commissioners 460-461) Filed May 4, 1935, Margaret L. Mullane, Clerk. By Catherine Murphy, Deputy.

[fol. 48] (Verdict in Cases Nos. 407, 459, 460 and 461.)

We, the jury in the above entitled causes, assess the compensation due the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the trustees under its mortgages, and the Western Union Telegraph Company, for the taking of the flowage easements described in the petitions herein, and the amendments thereto in the total sum of $177,594.68 dollars.

(1) Included in and as a part of our general verdict, we have allowed to the Railroad Company, the trustees under its mortgages, and the Telegraph Company, the sum of $9,831.00 dollars, for changes in and protection of their telephone, telegraph and signal lines.

(2) Included in and as a part of our general verdict, we have allowed to the railroad company and the trustees

under its mortgages the following amounts for changes in and protection of:

(a) Culvert L-527 ..... $ 2,982.47 dollars;

(b) Culvert L-80 ..... 2[illegible],122.46 dollars;

(c) Culvert L-84 ..... 20,470.00 dollars;

(d) Bridge L-82 ..... 12,650.00 dollars;

(e) Bridge L-90 ..... 0.00 dollars;

(3) Included in and as a part of our general verdict, we have allowed to the Railroad Company and the Trustees under its mortgages, the sum of $2,118.75 for changes in and protection of all the following designated small bridges and culverts:—L-82½, L-545½, L-549, L-551, L-565, L-567, L-595, L-599, L-601, L-603, L-603⅔, L-605, L-607, L-609, L-611, L-613, and L-629.

(4) Included in and as a part of our general verdict, we have allowed to the Railroad Company and the trustees under its mortgages, the sum of $101,420.00 dollars for necessary riprap and bank protection of the railroad embankments.

Dated this 20th day of December, A. D. 1935.

W. F. DEWITT,
Foreman.

(Endorsed—Verdict 407, 459, 460, 461) Filed December 20, 1935. Margaret L. Mullane, Clerk, By Kathryn F. O'Connor, Deputy.

[fol. 49] Stipulation With Reference to Division of Verdict and Form of Entry of Judgment.

United States District Court, District of Minnesota, First Division.

No. 407. At Law.
No. 459. At Law.
No. 460. At Law.
No. 461. At Law.

The United States and the respondents Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States

Trust Company of New York as Trustees, Chemical Bank & Trust Company and Howard B. Smith as successor Trustees, Guaranty Trust Company of New York and Merrel P. Gallaway as Trustees, The National City Bank of New York and William W. Hoffman as Trustees, and the Western Union Telegraph Company, without waiving any rights herein which they may have for a new trial or for an appeal from the judgment to be entered upon the verdict of the jury herein stipulate as follows:

Railroad Culvert L-84, which has now been rebuilt, and is known as Bridge L-84, was and is located on the county line between Wabasha and Winona Counties, and it is stipulated that the verdict for changes made at said L-84 may be herein treated as though it were located wholly in Winona County and may be added to the verdict in Law File 459 in said county.

[fol. 50] The verdict in File No. 459, No. 460 and No. 461 of this court being $177,594.68, and the award of the commissioners in Law File No. 407 being $58.50, upon which no proof was introduced in the trial had in this court for the reason that both parties are satisfied with the amount of said award for the lands therein taken, it is stipulated that the verdict in Winona and Wabasha counties may be sub-divided as follows:

Wabasha County—Law File No. 460 and No. 461.

General Verdict—$32,250.01

Special Finding No. 1—Signal and Telegraph Changes	$ 2,678.95
Special Finding No. 2(e)—Bridge L-90	None
Special Finding No. 3—Small Culverts L-595, L-599, L-601, L-603, L-603⅔, L-605, L-607, L-609, L-611, L-613 and L-629	1,771.84
Special Finding No. 4—Riprap and bank protection	27,799.22
Total	$ 32,250.01

Winona County—File Law No. 459.

General Verdict—$145,344.67

Special Finding No. 1—Signal and Telegraph Changes	$	7,152.05
Special Finding No. 2(a)—Culvert L-527		2,982.47
Special Finding No. 2(b)—Culvert L-80		28,122.46
[fol. 51] Special Finding No. 2(c)—Culvert L-84	$	20,470.00
Special Finding No. 2(d)—Bridge L-82		12,650.00
Special Finding No. 3—Small Culverts L-82½, L-545½, L-549, L-551, L-565, L-567		346.91
Special Finding No. 4—Riprap and bank protection		73,620.78
Total		$145,344.67

It Is Further Stipulated

That judgment may be entered in Winona County in Law File No. 407 of this court in the sum of $58.50, together with interest thereon from July 28, 1933 to the date of entry of judgment at the rate of 6% per annum;

That judgment may be entered in Winona County in Law File No. 459 of this court in the sum of $145,344.67, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum;

That judgment may be entered in Wabasha County in Law File No. 460 and No. 461 of this court in the sum of $32,250.01, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum; and

It Is Further Stipulated that said judgment in File Law No. 460 and No. 461 may be entered in Law File No. 461 and that the Clerk may enter in the docket of Law File No. 460 that judgment covering lands of said Railroad Com- [fol. 52] pany, said Trustees, and said Western Union

Telegraph Company is included within the judgment in Law File No. 461.

Dated, January 6th, 1936.

JOHN J. COURTNEY &
JOHN T. HARRINGTON,
Special Assistants to the Attorney General of the United States.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Respondents Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States Trust Company of New York as Trustees, Chemical Bank & Trust Company and Howard B. Smith as Successor Trustees, Guaranty Trust Company of New York and Merrel P. Gallaway as Trustees, The National City Bank of New York and William W. Hoffman as Trustees, and the Western Union Telegraph Company.

(Endorsed—Stipulation for Division of Verdict 407-459, 460, 461) Filed January 6, 1936, Margaret L. Mullane, Clerk.

[fol. 53] (Judgment, January 6, 1936.)

In the District Court of the United States in and for the District of Minnesota, First Division.

Equity Journal

Term Minutes.

June Term, A. D. 1935.

January 6, 1936.

Monday morning.

Court opened pursuant to adjournment.

Present: Honorable Joseph W. Molyneaux, Judge.
Honorable Matthew M. Joyce, Judge.

(Before Molyneaux, J.)

In the Matter of

The Condemnation by the United States of America of Certain Lands Situated in Winona County, Minnesota, Described as Tract No. Wi-1 Containing 1.30 Acres More or Less and Tract No. Wi-2 Containing .65 Acres More or Less, Required for the Improvement of Navigation in the Mississippi River.

(First Condemnation)
(Lock and Dam No. 5—Minneiska).

File No. 407. At Law. Dkt. #10144

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 acres)
(Lock and Dam No. 5—Minneiska).

File No. 459. At Law. Dkt. #10276.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third Condemnation—3140 acres)
(Lock and Dam No. 5—Minneiska.)

File No. 460. At Law. Dkt. #10277.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 acres)
(Lock and Dam No. 5—Minneiska).

File No. 461. At Law. Dkt. #10280.

[fol. 54] Wherefore, in accordance with said stipulation and order for judgment, it is by the Court:

Considered, Ordered and Adjudged that interest at six per cent (6%) per annum be allowed on the verdict of the jury in favor of the respondents Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States Trust Company of New York as Trustees, Chemical Bank & Trust Company and Howard B. Smith as Successor Trustees, Guaranty Trust Company of New York and Merrel P. Callaway as Trustees, The National City Bank of New York and William W. Hoffman as Trustees, and the Western Union Telegraph Company, in Law File No. 459, No. 460 and No. 461 from August 4, 1934 to the date of entry of judgment in said causes, and that the same be included in and be made a part of such judgment, and that the United States is allowed an exception thereto; that interest be and hereby is allowed upon the judgment in said causes from the date of entry of such judgment to the date of payment of the judgment in said causes.

Further Ordered that the following provision or limitation upon the flowage easement acquired by the United States in Law File No. 459, No. 460 and No. 461, be and the same is hereby included and made a part hereof:

"The United States is granted a flowage easement to maintain a normal pool upstream from Lock and Dam No. 5 which shall not at any point along the right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the property of the Western Union Telegraph Company exceed the surface elevation of 660 feet above mean sea level datum.

"Said easement shall include wave and ice action upon a pool maintained and permitted herein as aforesaid, but does not and shall not include the right by swellhead or backwater effect in the Mississippi River to raise the waters of the Mississippi River or its tributaries to an elevation in excess of 660 feet above mean sea level datum at any point along the right of way and property of said Railroad and Telegraph Companies herein involved."

Further Ordered That the Verdict for changes made at Railroad Culvert L-84, which has now been rebuilt and is known as Bridge L-84, and which was and is located on the county line between Wabasha and Winona Counties, be herein treated as though it were located wholly in Winona County and be added to the verdict in Law File 459 in said county, and

That the verdict in Law File No. 459, No. 460 and No. 461 of this Court being $177,594.68, and the award of the commissioners in Law File No. 407 being $58.50, upon which no proof was introduced in the trial had in this court for the reason that both parties are satisfied with the amount of said award for the lands therein taken, it is hereby or- [fol. 55] dered and adjudged that the verdict in Winona and Wabasha counties be sub-divided as follows:

Wabasha County—Law File No. 460 and No. 461.

General Verdict—$32,250.01

Special Findings No. 1— Signal and Telegraph Changes	$2,678.95
Special Findings No. 2 (e)—Bridge L-90	none
Special Findings No. 3— Small Culverts L-595, L-599, L-601, L-603, L-603⅔, L-605, L-607, L-609, L-611, L-613, and L-629	1,771.84
Special Finding No. 4— Riprap and bank protection	27,799.22
Total	$32,250.01

Winona County—Law File No. 459.

General Verdict—$145,344.67

Special Finding No. 1— Signal and Telegraph Changes	$ 7,152.05
Special Finding No. 2 (a)—Culvert L-527	2,982.47
Special Finding No. 2 (b)—Culvert L-80	28,122.46
Special Finding No. 2 (c)—Culvert L-84	20,470.00
Special Finding No. 2 (d)—Bridge L-82	12,650.00

Special Finding No. 3—	
Small Culverts L-82½, L-545½, L-549, L-551, L-565, L-567	346.91
Special Finding No. 4—	
Riprap and bank protection	73,620.78
Total	$145,344.67

It Is Further Ordered and Adjudged that judgment may be entered in Winona County in Law File No. 407 of this Court in the sum of $58.50, together with interest thereon from July 28, 1933 to the date of entry of judgment at the rate of 6% per annum.

That judgment may be entered in Winona County in Law File No. 459 of this Court in the sum of $145,344.67, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum.

That judgment may be entered in Wabasha County in Law File No. 460 and 461 of this Court in the sum of $32,250.01, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum; and

That said judgment in Law File No. 460 and No. 461 may be entered in Law File No. 461 and that the Clerk may enter in the docket of Law File No. 460 that judgment [fol. 56] covering lands of said Railroad Company, said Trustees, and said Western Union Telegraph Company is included within the judgment in Law File No. 461.

[fol. 57] (Notice of Appeal by United States in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney, for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain Land in Winona County, Minn.; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

Please Take Notice, That the United States of America appeals to the Circuit Court of Appeals for the Eighth Circuit from the judgment of the United States District Court for the District of Minnesota (First Division), entered in the office of the Clerk of said Court on the sixth (6th) day of January, 1936, and from each and every part of said judgment.

Dated this 3rd day of April, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota,

JOHN J. COURTNEY,
Special Assistant to the Attorney General,
214 Federal Courts Bldg.,
St. Paul, Minnesota.

To: Margaret L. Mullane, Clerk, United States District Court for the District of Minnesota.
A. C. Erdall and F. W. Root, Attorneys for appellee.

Service of the foregoing Notice of Appeal by copy thereof is hereby admitted this 3rd day of April, 1936.

F. W. ROOT &
A. C. ERDALL,
Attorneys: Chicago, Milwaukee St. Paul & Pacific Ry. Co. & Western Union Telegraph & Cable Company.

[fol. 58] (Endorsed—Notice of Appeal 459) Filed April 3, 1936. Margaret L. Mullane, Clerk, By Kathryn F. O'Connor.

[fol. 59] (Notice of Appeal by United States in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Chicago, Milwaukee, St. Paul, & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

Please Take Notice That the United States of America appeals to the Circuit Court of Appeals for the Eighth Circuit from the judgment of the United States District Court

for the District of Minnesota (First Division), entered in the office of the Clerk of said Court on the sixth (6th) day of January, 1936, and from each and every part of said judgment.

Dated this 10 day of August, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota.

JOHN J. COURTNEY,
Special Assistant to Attorney General, 214 Federal Cts. Bldg., St. Paul, Minn.

To: Margaret L. Mullane, Clerk, United States District Court for the District of Minnesota.

A. C. ERDALL and
F. W. ROOT,
Attorneys for appellees.

[fol. 60] Service of the foregoing Notice of Appeal by copy thereof is hereby admitted this 11th day of August, 1936.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Chicago, Milwaukee, St. Paul & Pacific Ry. Co., its Trustees, and Western Union Telegraph & Cable Company.

(Endorsed—Notice of Appeal 460, 461) Filed August 11, 1936. Margaret L. Mullane, Clerk. By Olive Davies, Deputy.

[fol. 61] (Petition for Appeal in Cases No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

To the Honorable the United States District Court for the District of Minnesota, First Division:

Your Petitioner, the United States of America who, feeling aggrieved by the judgment entered in the above-entitled cause on the sixth (6) day of January, 1936, files its Assignment of Errors and Notice of Appeal herewith, and petitions this Honorable Court to allow said appeal;

Your Petitioner, respectfully shows that it has filed in the office of the Clerk of the above Court, a written notice that it appeals from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons and upon the grounds set forth in the Assignment of Errors filed as aforesaid; that no bond, obligation or security is required of the Petitioner under the provisions of Section 1001 Revised Statutes of the United States, the said Petitioner being the United States of America.

That by reason thereof Citation should be issued as provided by law and a transcript duly authenticated should be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

[fol. 62] Wherefore Your Petitioner Prays That a Citation be issued and that a transcript duly authenticated of the record in said cause be sent to the United States Circuit Court of Appeals for the Eighth Circuit, according to law and the rules of said Court.

Dated this 3rd day of April, 1936.

THE UNITED STATES OF AMERICA, Petitioner,
By George F. Sullivan,
United States Attorney for the District of Minnesota.
John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

(Order Allowing Appeal in Case No. 459.)

Upon the foregoing Petition, and upon all the files, records and proceedings in the above-entitled matter,

It Is Hereby Ordered That said appeal be allowed as prayed for; that a Citation be issued as provided by law, and that a duly authenticated transcript of record be sent to the United States Circuit Court of Appeals for the Eighth Circuit, and it satisfactorily appearing to the Court that this appeal is taken by the United States of America, accordingly no bond, obligation or security is required of Petitioner on this appeal.

Dated this 3rd day of April, 1936.

JOSEPH W. MOLYNEAUX,
United States District Judge for the District of Minnesota (First Division).

(Endorsed—Petition and Order Allowing Appeal 459) Filed April 3, 1936, Margaret L. Mullane, Clerk. By Kathryn F. O'Connor.

[fol. 63] (Petition for Appeal in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Chicago, Milwaukee, St Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

To the Honorable the United States District Court for the District of Minnesota, First Division:

Your Petitioner, the United States of America who, feeling aggrieved by the judgment entered in the above-entitled cause on the sixth (6) day of January, 1936, files its Assignment of Errors and Notice of Appeal herewith, and petitions this Honorable Court to allow said appeal;

Your Petitioner respectfully shows that it has filed in the office of the Clerk of the above Court, a written notice that it appeals from said judgment to the United States [fol. 64] Circuit Court of Appeals for the Eighth Circuit for the reasons and upon the grounds set forth in the Assignment of Errors filed as aforesaid; That no bond, ob-

ligation or security is required of the Petitioner under the provisions of Section 1001 Revised Statutes of the United States, the said Petitioner being the United States of America.

That by reason thereof Citation should be issued as provided by law and a transcript duly authenticated should be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Wherefore Your Petitioner Prays That a Citation be issued and that a transcript duly authenticated of the record in said cause be sent to the United States Circuit Court of Appeals for the Eighth Circuit, according to law and the rules of said Court.

Dated this 10th day of April, 1936.

THE UNITED STATES OF AMERICA, Petitioner,
By George F. Sullivan,
United States Attorney for the District of Minnesota.

John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

(Order Allowing Appeal in Cases Nos. 460 and 461.)

Upon the foregoing Petition, and upon all the files, records and proceedings in the above entitled matter,

It Is Hereby Ordered That said appeal be allowed as prayed for; that a Citation be issued as provided by law, and that a duly authenticated transcript of record be sent to the United States Circuit Court of Appeals for the Eighth Circuit, and it satisfactorily appearing to the Court that this appeal is taken by the United States of America, accordingly no bond, obligation or security is required of Petitioner on this appeal.

Dated this 10 day of August, 1936.

JOHN B. SANBORN,
U. S. Circuit Judge.

[fol. 65] (Endorsed—Petition for Appeal 460-461) Filed August 10, 1936. Margaret L. Mullane, Clerk. By Olive Davies, Deputy.

[fol. 66] (Citation and Admission of Service in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

To The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company, and to F. W. Root, and A. C. Erdall, its attorneys:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Eighth Circuit at the City of Saint Louis in the State of Missouri, forty (40) days from and after the date this Citation bears, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the District of Minnesota, First Division, wherein the United States of America is appellant and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company are appellees, to show cause, if any there be, why the judgment rendered

in said cause against the said appellant should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand in the City of Saint Paul, State of Minnesota, in the District and Circuit above-named, this 3rd day of March, in the year of our Lord one thousand nine hundred thirty-six.

JOSEPH W. MOLYNEAUX,
United States District Judge.

Due service of the above Citation is hereby admitted this 3rd day of March, 1936.

F. W. ROOT &
A. C. ERDALL,
Attorneys for Chicago, Milwaukee, St. Paul & Pacific RR. Co., & Western Union Telegraph & Cable Company.

[fol. 67] Endorsed: Filed in U. S. District Court on April 3, 1936.

[fol. 68] (Citation and Admission of Service in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents,

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

To The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Western Union Telegraph & Cable Company, and to F. W. Root, and A. C. Erdall, their attorneys:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Eighth Circuit at the City of Saint Louis in the State of Missouri, forty (40) days from and after the date this Citation bears, pursuant to an appeal filed in [fol. 69] the office of the Clerk of the United States District Court for the District of Minnesota, First Division, wherein the United States of America is appellant and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cumrings and George I.

Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and the Western Union Telegraph & Cable Company are appellees, to show cause, if any there be, why the judgment rendered in said cause against the said appellant should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand in the City of Saint Paul, State of Minnesota, in the District and Circuit above-named, this 10 day of August, in the year of our Lord one thousand nine hundred thirty-six.

JOHN B. SANBORN,
U. S. Circuit Judge.

Service of the above Citation is hereby admitted this 11th day of August, 1936.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for the C. M. St. P. & P., its Trustees, and Western Union Telegraph & Cable Company.

[fol. 70] Endorsed: Filed in U. S. District Court on August 11, 1936.

[fol. 71] (Assignment of Errors in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain Land in Winona County, Minn., Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

Now comes the United States of America, the Petitioner in the above-entitled proceedings, in connection with and as a part of its Petition for Appeal herein, assigns the following errors, which it avers were committed by the District Court in its rulings, orders and instructions upon which the Petitioner relies to reserve the judgment entered herein.

Error No. I.

That the Court erred in refusing to give the following instructions:

Government's Requested Instruction No. 2.

You are instructed that with reference to the bridges and culverts, the Railroad Company asserts a claim for alteration of such structures. Insofar as the claimed necessity for such alterations is founded upon an anticipated deposition of silt and debris in such culverts and bridges, you are instructed that no recovery may be awarded where the testimony shows that the silt and debris is carried to the culverts and bridges by tributary streams which flow into the Mississippi River. The carriage of silt and debris by tributary streams is an independent, natural force over which the Government has no control, and for which it [fol. 72] may be subjected to no liability. If you are satisfied by a fair preponderance of the evidence that the existence of the 660 pool created by Lock and Dam No. 5 contributes to the deposition of silt so carried by the tributary streams, and in such a manner as to clog the culverts and bridges of the Railroad Company, there would still be no right of recovery against the United States, since such an event is a consequential injury resulting from the pool which does not constitute a taking."

To which refusal exception was duly noted.

Error No. II.

That the Court erred in refusing to give the following instructions:

Government's Requested Instruction No. 4.

"The liability of the United States in this proceeding is governed primarily by the Fifth Amendment to the United States Constitution. That amendment provides that the United States, when it takes private property for public use, shall pay a just compensation therefor. The liability of the Government consequently arises only when private property is taken for public use, and excludes those situations where the property is merely damaged but not appropriated. A taking of the property occurs when by reason of some act of the United States the owner is directly ousted of his use and possession of the property. If the act of the Government does not so oust the owner, but inflicts upon his property an injury, the United States sustains no liability. Where it appears from the facts that the United States is improving a navigable river, as a result of which injury is inflicted upon adjoining lands, and the facts further disclose that by resorting to protective measures, the owner of such land can ward off the injurious consequences, no liability is thereby imposed upon the United States. The reason for such non-liability follows from the contention of the Fifth Amendment that payment of compensation is only required where the property is taken. Obviously the property cannot be said to be taken where, after the alleged taking, it remains in the use and possession of the owner.

"You are consequently instructed that in the case at bar, the property of the Chicago, Milwaukee, St. Paul and [fol. 73] Pacific Railroad Company and of the Western Union Telegraph Company has not been taken as a result of the raising of the pool and the condemnation of the easement to elevation 660 against the embankment and structures of the said Companies. The evidence discloses that by resorting to protective measures, the property of the Railroad Company and of the Western Union Company will remain in their full and complete use and possession to the same exent and as prior to the commencement of this condemnation suit, subject only to the concurrent use of a portion of the right-of-way to elevation 660 by the United States.

"You are instructed that the just compensation therefor, to which the respondents are entitled, is the value of the concurrent usage by the United States of that portion of the properties of the said respondents lying within the limits of the easement condemned, and is not the sum of money which will compensate the said respondents for the injury or damage done to their respective properties by reason of the presence of the pool water at elevation 660 above mean sea level datum."

To which refusal exception was duly noted.

Error No. III.

That the Court erred in instructing the jury as follows:

"For all damage directly and proximately caused to the Railroad Company and the Telegraph Company by the taking of the flowage easement from the level of ordinary high water mark to 660 feet above mean sea level, the United States is liable to the Railroad Company and the Telegraph Company. That means that so far as the government in these proceedings takes a flowage easement in the property of the Railroad Company and the Telegraph Company above high water mark and up to 660 feet above mean sea level, it must pay compensation for any damage that it does or for any taking."

To which exception was duly noted.

Error No. IV.

That the Court erred in instructing the jury as follows:

"In measuring the compensation to which the Railroad Company and the Telegraph Company are entitled, you should allow for the flowage easement taken by the Gov-[fol. 74] ernment, the costs of adjusting the railroad structures and the telegraph structures so as to meet the new conditions created by maintaining the flowage easement along the property at 660 feet above mean sea level. This may include the reasonable cost of raising and widening the embankment, riprapping the slopes of the embankment, raising or adjusting the bridges, changing and adjusting culverts, widening or raising the railroad embankment and tracks, changing the telegraph lines and other structures, which changes are made reasonably necessary

by reason of the taking of said flowage easement by the Government, that is, which changes are reasonably necessary to place the Railroad and the Telegraph Company in as good a position after the taking as they were in before the taking."

To which exception was duly noted.

Error No. V.

That the Court erred in charging the jury as follows:

"They (the respondents) are entitled to have the railroad property, including the culverts, bridges and telegraph lines changed and adjusted, if that be necessary, to make the road and its property as safe for railroad purposes after the taking of the easement as it was before, and are entitled to recover in these proceedings from the Government, the reasonable cost of so adjusting the Railroad and Telegraph properties."

To which exception was duly noted.

Error No. VI.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owner of property along the Mississippi river has the right to the enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and the United States has no easement beyond the natural one, without grant or dedication, save by condemnation with appropriate compensation for the private right * * * and this instruction that the riparian owner of property has the right to the enjoyment of the natural flow of the river, must be modified in this case to the extent of saying that the raising of the water above its natural flow, up to the level of ordinary high water mark, has done no damage, and therefore that instruction must be modified to that extent."

[fol. 75] To which exception was duly noted.

Error No. VII.

That the Court erred in instructing the jury as follows:

"You are instructed that the right to have the water flow away from bridges and culverts extending through the

railroad embankments, unobstructed except as in the course of nature, is an inseparable part of the land, and a destruction of this right is a taking of a part of the land for which the United States must make appropriate compensation to the owner of such right. But here it must also be kept in mind that the Railroad and Telegraph Companies can only recover under such circumstances if the damage occurs by reason of the water being raised in the Mississippi river above the level of ordinary high water mark. That is, this instruction that the property owner,—in this case the Railroad Company and the Telegraph Company,—have the right to have these streams flow away from its property, unobstructed, as it has in the past, is modified by the stipulation of the parties that no damage was done by interfering with the natural flow of the river by raising it to the level of ordinary high water mark."

To which exception was duly noted.

Error No. VIII.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owners are entitled to recover for damage done by ice and water being thrown against the property by reason of the raising of the Mississippi river above the level of ordinary high water mark."

To which exception was duly noted.

Error No. IX.

That the Court erred in instructing the jury as follows:

"You are instructed that if the impounding of the waters of the Mississippi river by the construction of Lock and Dam No. 5 makes it necessary for the Railroad Company and the Telegraph Company, respectively, to raise its tracks, to widen its embankments, to riprap its embank- [fol. 76] ments, or to change the location or strengthen its bridges, culverts, signal and telegraph lines, or other structures or appurtenances, that such items are proper items for you to take into consideration in ascertaining the amount of compensation wh h said Railroad and Tele-

graph Companies are entitled to recover from the United States."

To which exception was duly noted.

Error No. X.

That the Court erred in instructing the jury as follows:

"There can be but one recovery of compensation by the Railroad and Telegraph Companies for the taking of said flowage easement and all damages, present and future, which from the evidence you believe the Railroad Company and the Telegraph Company will sustain as a direct and proximate result of said taking, must be recovered in these proceedings."

To which exception was duly noted.

Error No. XI.

That the Court erred in denying the motion of the Government upon the opening statement of the respondents to instruct the jury to return a verdict in favor of the Government in each of the three cases now on trial in the sum of $1.00, upon the grounds that from the opening statement of counsel it appears conclusively there has been no taking of the railroad property within the meaning of the Constitution, and upon the ground that the only asserted claims are for consequential injuries which are not compensable in a proceeding of this character under the Fifth Amendment, and that the damages stated are wholly prospective, which motion was denied and an exception duly noted.

Error No. XII.

That the Court erred in overruling the government's offer of proof as follows:

"The Government offers to prove that four segments of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and of the Western Union Telegraph Company, between Stations 4990 plus 86.5 to 4978 plus 86.5, a distance of 1200 feet; between Stations 4968 plus 86.5 to 4948 plus 86.5, a distance of 2000 feet; between Stations 4936 to 4927, a distance of 900 feet; and between Stations 4807 to 4795, a distance of 1200 feet; are constructed on land which is located below ordinary high water mark and above low

water mark. The Government further offers to prove that no Act of Congress exists consenting to the construction of [fol. 77] the Railroad embankments at the above stated locations where the Government contends the Railroad embankments are constructed below the ordinary high water mark, although the Government concedes the embankments were constructed above low water mark, and that no authorization by, or approval of, such construction was secured from the Secretary of War or the United States Chief of Engineers other than is evidenced by the Government Exhibits 69, 70 and 71. The Major Riche referred to in Government Exhibit 69 was the officer of the United States Engineers in charge of the section of the Mississippi River in which the area in question is located and that Mr. Rhame, referred to in Government Exhibit 71, was the District Engineer of the Railroad Company in charge of that part of the Railroad Company within this condemnation." to which offer objection was made and which objection was sustained as follows:

"The Court: The objection to the offer of proof contained in the foregoing stipulation is sustained and an exception allowed."

Error No. XIII.

That the Court erred in denying the motion of the United States to dismiss from the proceedings four segments of railroad property as follows: between stations 4990 plus 86.5 to 4978 plus 86.5, and between stations 4968 plus 86.5 to 4948 plus 86.5, between stations 4936 to 4927, between stations 4807 to station 4798; which said motion was duly filed in writing and incorporated in the record and made pursuant to a direction of the Secretary of War of the United States, a properly authenticated copy of which was filed in the proceedings, and to the refusal to grant which an exception was duly noted.

Error No. XIV.

That the Court erred in denying the Government's written motion as follows, to-wit:

"Motion For Directed Verdict.

"Now comes the petitioner, the United States of America, and respectfully moves the Court to peremptorily in-

struct the jury herein to return a verdict in favor of the respondents, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the Western Union Telegraph Company, in the sum of One ($1.00) Dollar for the reasons following:

1. The liability of the United States in this proceeding is limited by the Fifth Amendment to the United States Constitution to the payment of compensation for private property taken for public use.

2. Property is taken within the purview of the Fifth Amendment only where the evidence discloses a direct invasion of the property of respondents directly resulting in an ouster of the owner's use and possession.

3. The United States is in no event liable for an injury to property which does not so result in an ouster of the owner's use and possession.

[fol. 78] 4. The United States is not liable for the cost of reconstructing or altering property for the purpose of restraining the flowage of water upon such property nor for the cost of reconstructing or altering property to withstand the injurious effects of water where the presence of such water, and in the absence of such protective measures, would not constitute a taking of such property.

5. Consequently, the true measure of the liability of the United States in this proceeding is not the cost of raising, riprapping and otherwise protecting the railroad embankment, structures and transmission lines, but is the value of the easement condemned by the Government.

6. The burden of proof is upon the respondents to establish the value of such easement. There has been no competent evidence adduced on such issue, for which reason the jury should be instructed to return a verdict in the sum of One ($1.00) Dollar.

7. The United States is not liable for injuries which do not directly and proximately flow from the raising of the pool to elevation 660, but which may occur in the future by reason of the intervention of independent and natural forces. No recovery may be adjudged against the United States for the reconstruction or alteration of bridges or

culverts where the Railroad Company anticipates that its existing bridges and culverts will be rendered inadequate by reason of the future deposition of silt and debris conveyed into the Mississippi river from tributary streams. Such proof does not establish a taking but is addressed to the advent of a consequential injury which is damnum absque injuria.

For all of which reasons the Government respectfully submits that it is entitled to a directed verdict as above requested."

which was filed in this cause, denied in the Court nisi and to which an exception was duly noted.

Error No. XV.

That the Court erred in entering an order over the Government's objection dated January 3, 1936, which directed, inter alia, the payment of interest on the verdict of the jury, the portion of said order assigned as error being:

"Ordered that interest at six per cent (6%) per annum be allowed on the verdict of the jury in favor of the aforementioned respondents in the above entitled causes from August 4, 1934 to the date of entry of judgment in said causes, and that same be included in and be made a part of such judgment; further that after the entry of judgment in said causes, interest be and hereby is allowed upon the judgment in said causes from the date of entry of such judgment to the date of payment of the judgment in said causes."

to which order exception was duly noted.

Dated this 3d day of April, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
U. S. Attorney for District of Minn.
Daniel F. Steck,
John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

[fol. 79] (Endorsed—Assignment Of Errors 459) Filed April 3, 1936, Margaret L. Mullane, Clerk, By Kathryn F. O'Connor.

[fol. 80] (Assignment of Errors in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law.
File No. 461 At Law

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents,

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

Now comes the United States of America, the Petitioner in the above entitled proceedings, in connection with and as a part of its Petition for Appeal herein, assigns the following errors, which it avers were committed by the District Court in its rulings, orders and instructions upon which the Petitioner relies to reserve the judgment entered herein.

[fol. 81] Error No. I.

That the Court erred in refusing to give the following instructions:

Government's Requested Instruction No. 2.

"You are instructed that with reference to the bridges and culverts, the Railroad Company asserts a claim for alteration of such structures. Insofar as the claimed necessity for such alterations is founded upon an anticipated deposition of silt and debris in such culverts and bridges, you are instructed that no recovery may be awarded where the testimony shows that the silt and debris is carried to the culverts and bridges by tributary streams which flow into the Mississippi river. The carriage of silt and debris by tributary streams is an independent, natural force over which the Government has no control, and for which it may be subjected to no liability. If you are satisfied by a fair preponderance of the evidence that the existence of the 660 pool created by Lock and Dam No. 5 contributes to the deposition of silt so carried by the tributary streams, and in such a manner as to clog the culverts and bridges of the Railroad Company, there would still be no right of recovery against the United States, since such an event is a consequential injury resulting from the pool which does not constitute a taking."

To which refusal exception was duly noted.

Error No. II.

That the Court erred in refusing to give the following instructions:

[fol. 82] Government's Requested Instruction No. 4.

"The liability of the United States in this proceeding is governed primarily by the Fifth Amendment to the United

States Constitution. That amendment provides that the United States, when it takes private property for public use, shall pay a just compensation therefor. The liability of the Government consequently arises only when private property is taken for public use, and excludes those situations where the property is merely damaged but not appropriated. A taking of the property occurs when by reason of some act of the United States the owner is directly ousted of his use and possession of the property. If the act of the Government does not so oust the owner, but inflicts upon his property an injury, the United States sustains no liability. Where it appears from the facts that the United States is improving a navigable river, as a result of which injury is inflicted upon adjoining lands, and the facts further disclose that by resorting to protective measures, the owner of such land can ward off the injurious consequences, no liability is thereby imposed upon the United States. The reason for such non-liability follows from the condition of the Fifth Amendment that payment of compensation is only required where the property is taken. Obviously the property cannot be said to be taken where, after the alleged taking, it remains in the use and possession of the owner.

"You are consequently instructed that in the case at bar, the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and of the Western Union Telegraph Company has not been taken as a result of the [fol. 83] raising of the pool and the condemnation of the easement to elevation 660 against the embankment and structures of the said Companies. The evidence discloses that by resorting to protective measures, the property of the Railroad Company and of the Western Union Company will remain in their full and complete use and possession to the same extent and as prior to the commencement of this condemnation suit, subject only to the concurrent use of a portion of the right-of-way to elevation 660 by the United States.

"You are instructed that the just compenastion therefor, to which the respondents are entitled, is the value of the concurrent usage by the United States of that portion of the properties of the said respondents lying within the limits of the easement condemned, and is not the sum of

money which will compensate the said respondents for the injury or damage done to their respective properties by reason of the presence of the pool water at elevation 660 above mean sea level datum."

To which refusal exception was duly noted.

Error No. III.

That the Court erred in instructing the jury as follows:

"For all damage directly and proximately caused to the Railroad Company and the Telegraph Company by the taking of the flowage easement from the level of ordinary high water mark to 660 feet above mean sea level, the United States is liable to the Railroad Company and the Telegraph Company. That means that so far as the government in these proceedings takes a flowage easement in the property of the Railroad Company and the Telegraph Company above high water mark and up to 660 feet above mean sea level, it must pay compensation for any damage that it does or for any taking."

To which exception was duly noted.

[fol. 84] Error No. IV.

That the Court erred in instructing the jury as follows:

"In measuring the compensation to which the Railroad Company and the Telegraph Company are entitled, you should allow for the flowage easement taken by the Government, the costs of adjusting the railroad structures and the telegraph structures so as to meet the new conditions created by maintaining the flowage easement along the property at 660 feet above mean sea level. This may include the reasonable cost of raising and widening the embankment, riprapping the slopes of the embankment, raising or adjusting the bridges, changing and adjusting culverts, widening or raising the railroad embankment and tracks, changing the telegraph lines and other structures, which changes are made reasonably necessary by reason of the taking of said flowage easement by the Government, that is, which changes are reasonably necessary to place the Railroad and the Telegraph Company in as good a position after the taking as they were in before the taking."

To which exception was duly noted.

Error No. V.

That the Court erred in charging the jury as follows:

"They (the respondents) are entitled to have the railroad property, including the culverts, bridges and telegraph lines changed and adjusted, if that be necessary, to make the road and its property as safe for railroad purposes after the taking of the easement as it was before, and are entitled to recover in these proceedings from the Government, the reasonable cost of so adjusting the Railroad and Telegraph properties."

To which exception was duly noted.

[fol. 85] Error No. VI.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owner of property along the Mississippi river has the right to the enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and the United States has no easement beyond the natural one, without grant or dedication, save by condemnation with appropriate compensation for the private right * * * and this instruction that the riparian owner of property has the right to the enjoyment of the natural flow of the river, must be modified in this case to the extent of saying that the raising of the water above its natural flow, up to the level of ordinary high water mark, has done no damage, and therefore that instruction must be modified to that extent."

To which exception was duly noted.

Error No. VII.

That the Court erred in instructing the jury as follows:

"You are instructed that the right to have the water flow away from bridges and culverts extending through the railroad embankments, unobstructed except as in the course of nature, is an inseparable part of the land, and a destruction of this right is a taking of a part of the land for which the United States must make appropriate compensation to the owner of such right. But here it must also be kept in mind that the Railroad and Telegraph Companies can only recover under such circumstances if the damage

occurs by reason of the water being raised in the Mississippi river above the level of ordinary high water mark. That is, this instruction that the property owner,—in this case the Railroad Company and the Telegraph Company,—have the right to have these streams flow away from its [fol. 86] property, unobstructed, as it has in the past, is modified by the stipulation of the parties that no damage was done by interfering with the natural flow of the river by raising it to the level of ordinary high water mark."

To which exception was duly noted.

Error No. VIII.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owners are entitled to recover for damage done by ice and water being thrown against the property by reason of the raising of the Mississippi river above the level of ordinary high water mark."

To which exception was duly noted.

Error No. IX.

That the Court erred in instructing the jury as follows:

"You are instructed that if the impounding of the waters of the Mississippi river by the construction of Lock and Dam No. 5 makes it necessary for the Railroad Company and the Telegraph Company, respectively, to raise its tracks, to widen its embankments, to riprap its embankments, or to change the location or strengthen its bridges, culverts, signal and telegraph lines, or other structures or appurtenances, that such items are proper items for you to take into consideration in ascertaining the amount of compensation which said Railroad and Telegraph Companies are entitled to recover from the United States."

To which exception was duly noted.

Error No. X.

That the Court erred in instructing the jury as follows:

"There can be but one recovery of compensation by the Railroad and Telegraph Companies for the taking of said [fol. 87] flowage easement and all damages, present and

future, which from the evidence you believe the Railroad Company and the Telegraph Company will sustain as a direct and proximate result of said taking, must be recovered in these proceedings."

To which exception was duly noted.

Error No. XI.

That the Court erred in denying the motion of the Government upon the opening statement of the respondents to instruct the jury to return a verdict in favor of the Government in each of the three cases now on trial in the sum of $1.00, upon the grounds that from the opening statement of counsel it appears conclusively there has been no taking of the railroad property within the meaning of the Constitution, and upon the ground that the only asserted claims are for consequential injuries which are not compensable in a proceeding of this character under the Fifth Amendment, and that the damages stated are wholly prospective, which motion was denied and an exception duly noted.

Error No. XII.

That the Court erred in overruling the government's offer of proof as follows:

"The Government offers to prove that four segments of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and of the Western Union Telegraph Company, between Stations 4990 plus 86.5 to 4978 plus 86.5, a distance of 1200 feet; between Stations 4968 plus 86.5 to 4948 plus 86.5, a distance of 2000 feet; between Stations 4936 to 4927, a distance of 900 feet; and between Stations 4807 to 4795, a distance of 1200 feet; are constructed on land which is located below ordinary high water mark and above low water mark. The Government further offers to prove that no Act of Congress exists consenting to the construction of the Railroad embankments at the above stated locations where the Government contends the Railroad embankments [fol. 88] are constructed below the ordinary high water mark, although the Government concedes the embankments were constructed above low water mark, and that no authorization by, or approval of, such construction was secured from the Secretary of War or the United States

Chief of Engineers other than is evidenced by the Government Exhibits 69, 70 and 71. The Major Riche referred to in Government Exhibit 69 was the officer of the United States Engineers in charge of the section of the Mississippi River in which the area in question is located and that Mr. Rhame, referred to in Government Exhibit 71, was the District Engineer of the Railroad Company in charge of that part of the Railroad Company within this condemnation."

to which offer objection was made and which objection was sustained as follows:

"The Court: The objection to the offer of proof contained in the foregoing stipulation is sustained and an exception allowed."

Error No. XIII.

That the Court erred in denying the Motion of the United States to dismiss from the proceedings four segments of railroad property as follows: between stations 4990 plus 86.5 to 4978 plus 86.5 and between stations 4968 plus 86.5 to 4948 plus 86.5, between stations 4936 to 4927, between stations 4807 to station 4798; which said motion was duly filed in writing and incorporated in the record and made pursuant to a direction of the Secretary of War of the United States, a properly authenticated copy of which was filed in the proceedings, and to the refusal to grant which an exception was duly noted.

Error No. XIV.

That the Court erred in denying the Government's written motion as follows, to-wit:

"Motion for Directed Verdict.

"Now comes the petitioner, the United States of America, and respectfully moves the Court to peremptorily instruct the jury herein to return a verdict in favor of the respondents, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the Western Union Telegraph Company, in the sum of One ($1.00) Dollar for the reasons following:

[fol. 89] 1. The liability of the United States in this proceeding is limited by the Fifth Amendment to the United

States Constitution to the payment of compensation for private property taken for public use.

2. Property is taken within the purview of the Fifth Amendment only where the evidence discloses a direct invasion of the property of respondents directly resulting in an ouster of the owner's use and possession.

3. The United States is in no event liable for an injury to property which does not so result in an ouster of the owner's use and possession.

4. The United States is not liable for the cost of reconstructing or altering property for the purpose of restraining the flowage of water upon such property nor for the cost of reconstructing or altering property to withstand the injurious effects of water where the presence of such water, and in the absence of such protective measures, would not constitute a taking of such property.

5. Consequently, the true measure of the liability of the United States in this proceeding is not the cost of raising, riprapping and otherwise protecting the railroad embankment, structures and transmission lines, but is the value of the easement condemned by the Government.

6. The burden of proof is upon the respondents to establish the value of such easement. There has been no competent evidence adduced on such issue, for which reason the jury should be instructed to return a verdict in the sum of One ($1.00) Dollar.

7. The United States is not liable for injuries which do not directly and proximately flow from the raising of the pool to elevation 660, but which may occur in the future by reason of the intervention of independent and natural forces. No recovery may be adjudged against the United States for the reconstruction or alteration of bridges or culverts where the Railroad Company anticipates that its existing bridges and culverts will be rendered inadequate by reason of the future deposition of silt and debris conveyed into the Mississippi river from tributary streams. Such proof does not establish a taking but is addressed to the advent of a consequential injury which is damnum absque injuria.

For all of which reasons the Government respectfully submits that it is entitled to a directed verdict as above requested."

which was filed in this cause, denied in the Court nisi and to which an exception was duly noted.

Error No. XV.

That the Court erred in entering an order over the Government's objection dated January 3, 1936, which directed, inter alia, the payment of interest on the verdict of the jury, the portion of said order assigned as error being:

[fol. 90] "Ordered that interest at six per cent (6%) per annum be allowed on the verdict of the jury in favor of the aforementioned respondents in the above entitled causes from August 4, 1934 to the date of entry of judgment in said causes, and that same be included in and be made a part of such judgment; further that after the entry of judgment in said causes, interest be and hereby is allowed upon the judgment in said causes from the date of entry of such judgment to the date of payment of the judgment in said causes."

to which order exception was duly noted.

Dated this 10 day of August, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
U. S. Attorney for District of Minnesota.
Daniel F. Steck,
John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

(Endorsed)—Assignment of Errors 460, 461) Filed August 10, 1936, Margaret L. Mullane, Clerk, By Olive Davies, Deputy.

[fol. 91] (Mandate of United States Circuit Court of Appeals Directing Dismissal of Certain Lands in Condemnation From Appeal in Case No. 459.)

United States of America,—ss.:

The President Of The United States Of America,

(Seal United States Circuit Court Of Appeals, Eighth Circuit.)

To The Honorable The Judges Of The District Court Of The United States For The District Of Minnesota.—Greeting:

Whereas, lately in the District Court of the United States for the District of Minnesota, before you, or some of you in a certain cause between the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner, and certain land in Winona County, Minnesota; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents, No. 459, At Law, wherein the judgment of the said District Court was entered on January 6, 1936, as appears from a certified copy thereof on file in the United States Circuit Court of Appeals for the Eighth Circuit;

as by the inspection of the Certificate of the Clerk of said District Court and of the certified copy of the judgment of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal allowed to the United States of America, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And Whereas, at the May term, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause came on to be heard before the said United States Circuit Court of Appeals, and the following order was made, viz.:

United States of America, Appellant,

vs.

Certain lands in Winona County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel

P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith, as Successor Trustees; Western Union Telegraph Company, Appellees.

The United States of America having appealed from a judgment in the sum of One Hundred Fifty-seven Thou- [fol. 92] sand Seven Hundred Forty-seven and 39/100 Dollars ($157,747.39), entered in the First Division, District of Minnesota, (File No. 459 at Law) for the condemnation of an easement over certain lands in Winona County, Minnesota, and a stipulation having been presented to this Court wherein and whereby the Appellant and the Appellees have agreed to segregate certain of the issues to be raised upon said appeal and to apportion the whole sum of the judgment rendered between the issues to be raised on appeal and those as to which there is now no controversy, by reason of decisions subsequent to this appeal, this Court having approved and accepted the stipulation of the parties on file herein,

It Is Ordered that the judgment aforesaid be and it hereby is vacated, set aside and reformed in the following manner and in the following respects, to-wit: That there be and hereby is dismissed from this said appeal, all of the lands in said condemnation proceeding aforesaid, save and except the following:

I. As to that portion of right-of-way in Lot 1, Section 7, Easterly of Railroad Station 4978+86.5 and Westerly of Station 4990+86.5 in Lot 1, Section 18, Township 108 North, Range 8 West of the 5th P. M.

II. As to that portion of land lying in Lot 2 of Section 7, Easterly of Station 4948+86.5 and Westerly of Station 4968+86.5 in Government Lot 1, Section 7, all in Township 108 North, Range 9 West of the 5th P. M.

III. As to that portion of right-of-way in Government Lot 2, Section 12, Easterly of Station 4927+00 and in Government Lot 3, Section 7, Westerly of Station 4936+00, all in Township 108 North, Range 8 West of the 5th P. M.

all situate in the County of Winona, State of Minnesota, and that the judgment of just compensation to be determined for the taking and condemnation of the lands herein dismissed from this said appeal shall be the sum of Eighty-four Thousand Nine Hundred Eighty-seven and 00/100 ($84,987.00) Dollars, as to which sum the District Court is directed to enter judgment, said judgment to bear interest at the rate of 6% per annum from December 9, 1934, until paid into the Registry of Court. Upon the payment of said sum with interest as aforesaid, the United States of America shall be entitled to a decree vesting in it title to the easement condemned save and except as to the lands in Areas I, II and III referred to above, and as to which jurisdiction is reserved on this appeal; and

[fol. 93] It appearing to the Court that during the pendency of this appeal, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company made application for reorganization under and pursuant to the terms of Section 77 of the Bankruptcy Act, upon which application Henry A. Scandrett, Walter J. Cummings and George I. Haight were appointed Trustees and that the railroad of said Railroad Company is now being operated by them pursuant to said act and appointment.

It is Ordered That the files, records and proceedings in this cause and in this Court, upon the entry of the judgment as directed in the Court below, be amended and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, be and they hereby are joined as additional parties in said proceeding.

Except as aforesaid jurisdiction of this Court over the appeal of the United States of America aforesaid, is retained by this Court as to the issues to be raised concerning the areas, and compensation therefor, hereinbefore referred to by metes and bounds. As to each of them this Court gives effect to the stipulation of the parties, dated June 16, 1938 and filed herein, to-wit: That the apportion of the judgment retained in this Court applicable to each thereof is as follows:

As to Area numbered I above	$13,292.04
As to Area numbered II above	$43,255.35
As to Area Numbered III above	$ 3,810.28

and as to these portions this Court gives effect to the aforesaid stipulation of June 16, 1938, together with interest thereon at 6% per annum from December 9, 1934, as provided for in said stipulation; and

The parties having agreed to limit the issues to be raised upon appeal,

It Is Ordered that all Assignments of Error, save and except Assignments Nos. XII and XIII, be and they hereby are waived, together with that portion of Assignments which prays the reversal of the judgment, jurisdiction of which is expressly retained by this Court; and

Let a mandate issue forthwith for the entry of the portion of the judgment as reformed and affirmed herein.

Dated this 6th day of September, 1938.

[fol. 94] You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the order of the United States Circuit Court of Appeals, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 9th day of September, in the year of our Lord one thousand nine hundred and thirty-eight.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed):—United States Circuit Court of Appeals, No. 11,300. May Term, 1938. United States of America, Appellant, vs. Certain Land in Winona County, Minnesota, et al. Mandate. Let the within Mandate be filed and recorded and judgment entered thereon. Dated Sept. 10, 1938. George F. Sullivan, U. S. District Judge. Filed September 10, 1938. Margaret L. Mullane, Clerk. By Kathryn F. O'Connor, Deputy.

[fol. 95] (Mandate of United States Circuit Court of Appeals Directing Dismissal of Certain Lands in Condemnation From Appeal in Cases Nos. 460 and 461.)

United States of America,—ss.:

The President of the United States of America,

(Seal United States Circuit Court of Appeals, Eighth Circuit.)

To the Honorable the Judges of the District Court of the United States for the District of Minnesota.—Greeting:

Whereas, lately in the District Court of the United States for the District of Minnesota, before you, or some of you in certain causes between the United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner, and Certain Land in Wabasha County, Minnesota, containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents, and the United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner, and Certain land in Wabasha County, Minnesota, containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents, Nos. 460 and 461, At Law, Consolidated, wherein the judgment of the said District Court was entered on January 6, 1936, as appears from a certified copy thereof on file in the United States Circuit Court of Appeals for the Eighth Circuit;

as by the inspection of the Certificates of the Clerk of said District Court and of the certified copy of the judgment of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal allowed to the United States of America and a cross-appeal allowed to the respondents,

agreeably to the act of Congress, in such case made and provided, fully and at large appears;

[fol. 96] And Whereas, at the May term, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause comes on to be heard before the said United States Circuit Court of Appeals, and the following order was made, viz.:

United States of America, Appellant,

vs.

Certain lands in Wabasha County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith, as Successor Trustees; Western Union Telegraph Company, Appellees.

The United States of America having appealed from a judgment in the sum of Thirty-five Thousand Two and no/100 ($35,002.00) Dollars, entered in the First Division, District of Minnesota, (File Nos. 460 and 461 Consolidated) for the condemnation of an easement over certain lands in Wabasha County, Minnesota, and a stipulation having been presented to this Court wherein and whereby the Appellant and the Appellees have agreed to segregate certain of the issues to be raised upon said appeal and to apportion the whole sum of the judgment rendered between the issues to be raised on appeal and those as to which there is now no controversy, by reason of decisions subsequent to this appeal, this Court having approved and accepted the stipulation of the parties on file herein,

It Is Ordered that the judgment aforesaid be and it hereby is vacated, set aside and reformed in the following manner and in the following respects, to-wit: That there be and hereby is dismissed from this said appeal, all of the lands in said condemnation proceeding aforesaid, save and except the following:

As to that portion of land lying Easterly of Station 4795+00 in Government Lot 4, and Westerly of Station 4807+00 in Government Lot 5, all in Township 109 North, Range 9 West of the 5th P. M. Wabasha County, Minnesota

and that the judgment of just compensation to be determined for the taking and condemnation of the lands herein dismissed from this said appeal shall be the sum of Twenty-five Thousand, Two and 80/100 ($25,002.80) Dollars, as to which sum the District Court is directed to enter Judgment, said judgment to bear interest at the rate of [fol. 97] 6% per annum from December 9, 1934, until paid into the Registry of Court. Upon the payment of said sum with interest as aforesaid, the United States of America shall be entitled to a decree vesting in it title to the easement condemned save and except as to the land referred to above, between Railroad Stations 4795+00 and 4807+00, and as to which jurisdiction is reserved on this appeal; and

It appearing to the Court that during the pendency of this appeal, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company made application for reorganization under and pursuant to the terms of Section 77 of the Bankruptcy Act, upon which application Henry A. Scandrett, Walter J. Cummings and George I. Haight were appointed Trustees and that the railroad of said Railroad Company is now being operated by them pursuant to said act and appointment,

It is Ordered That the files, records and proceedings in this cause and in this Court, upon the entry of the judgment as directed in the Court below, be amended and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, be and they hereby are joined as additional parties in said proceeding.

Except as aforesaid jurisdiction of this Court over the appeal of the United States of America aforesaid, is retained by this Court as to the issues to be raised concerning the area, and compensation therefor, hereinbefore referred to by metes and bounds. As to said area this Court gives effect to the stipulation of the parties dated June 16,

1938, filed herein, to-wit: That the apportion of the judgment retained in this Court applicable thereto is as follows: $7,247.21 and as to this portion this Court gives effect to the aforesaid stipulation of June 16, 1938, together with interest thereon at 6% per annum from December 9, 1934, as provided for and in said stipulation; and

The parties having agreed to limit the issues to be raised upon appeal,

It Is Ordered that all Assignments of Error, save and except Assignments Nos. XII and XIII, be and they hereby are waived, together with that portion of Assignments which prays the reversal of the judgment, jurisdiction of [fol. 98] which is expressly retained by this Court; and

It appearing to the Court from said stipulation of June 16, 1938, that the Appellees herein have filed a cross-appeal and have presented a motion to the Court for the dismissal of said appeal, upon said motion

It Is Ordered That the appeal of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be and it hereby is dismissed.

Let a mandate issue forthwith for the entry of the portion of the judgment as reformed and affirmed herein.

Dated this 6th day of September, 1938.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the order of the United States Circuit Court of Appeals, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 9th day of September, in the year of our Lord one thousand nine hundred and thirty-eight.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed):—United States Circuit Court of Appeals, No. 11,301. May Term, 1938. United States of America,

Appellant, vs. Certain Land in Wabasha County, Minnesota, et al. No. 11,302 Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., Appellant, vs. United States of America. Mandate. Let the within Mandate be filed and recorded and judgment entered thereon. Dated Sept. 10, 1938. George F. Sullivan, U. S. District Judge. Filed September 10, 1938. Margaret L. Mullane, Clerk. By Kathryn F. O'Connor, Deputy.

[fol. 99] (Stipulation For Preparation of Single Bill of Exceptions and One Transcript on Appeals.)

United States District Court, District of Minnesota, First Division.

U. S. Circuit Court of Appeals, Docket #11300.

United States of America, Petitioner-Appellant,
File No. 459. vs. At Law.
Certain Lands in Winona County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith, as Successor Trustees; Western Union Telegraph Company, Respondents-Appellees.

and

United States of America, Petitioner-Appellant,
File No. 460. vs. At Law.
Certain Lands in Wabasha County, Minnesota, Containing 3140 acres; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company

and Howard B. Smith as Successor Trustees; Western Union Telegraph Company, Respondents-Appellees.

and

U. S. Circuit Court of Appeals, Docket #11301.

United States of America, Petitioner-Appellant,
File No. 461. vs. At Law.
Certain Land in Wabasha County, Minnesota, Containing 1960 acres; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith as Successor Trustees; Western Union Telegraph Company, Respondents-Appellees.

[fol. 100] An appeal having been taken from a separate judgment rendered in file number 459, District Court of Minnesota, First Division, which said appeal is docketed as number 11300, and a separate appeal having been taken from a judgment rendered in files numbered 460, 461, consolidated District Court of Minnesota, First Division, which said appeal bears docket number 11301, and all of said cases having been tried as one by consent of the parties and subsequent to a rendition of the verdict therein, a separate judgment was entered; and

Since the said cases were tried as one the testimony contained in any proposed bill of exceptions would result in a large duplication;

Now, Therefore, It Is Stipulated And Agreed By and between the respective parties:

(1) That a single bill of exceptions and a single amendments to the bill of exceptions may by the respective parties be proposed as the bill of exceptions and amendments thereto to cover all of the above entitled cases and such bill of exceptions and amendments thereto may be filed insofar as they are duly allowed by the above entitled court

shall stand as and for the bill of exceptions in District Court files numbered 459, 460 and 461 and in Circuit Court of Appeals files numbered 11300 and 11301.

(2) That the transcript of the record in each of the above entitled cases may be printed as one transcript of record and be taken and considered as the transcript of record in each of the said appeals with the same force and effect as though separate transcripts of the record were filed in each of said appeals.

(3) That by entering into this stipulation, neither of the parties waives any rights concerning any issue of law which may be raised in either of the two separate judgments appealed from.

Dated this 4th day of August, 1939.

[fol. 101]

JOHN J. COURTNEY,
Special Assistant to the Attorney General of the United States.

JOHN T. HARRINGTON,
Special Assistant to the Attorney General of the United States.
Attorneys for Petitioner-Appellant.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
25 Milwaukee Station,
Minneapolis, Minnesota.
Attorneys for Respondents-Appellees.

(Endorsed—Stipulation Combining Record on Appeal, 459, 460-461) Filed August 8, 1939, Thomas H. Howard, Clerk, By Lyle E. Anderson, Deputy.

[fol. 102] (Order of United States Circuit Court of Appeals For Preparation of Single Bill of Exceptions and One Transcript on Appeals.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Monday, August 14, 1939.

United States of America, Appellant,
No. 11,300. vs.
Certain Lands in Winona County, Minnesota, et al.
Appeal from the District Court of the United States for the District of Minnesota.

and

United States of America, Appellant,
No. 11,301. vs.
Certain Lands in Wabasha County, Minnesota, et al.
Appeal from the District Court of the United States for the District of Minnesota.

In pursuance of the stipulation of parties and in accordance with the provisions therein contained, It is Ordered by this Court:

(1) That a single bill of exceptions and a single amendments to the bill of exceptions may by the respective parties be proposed as the bill of exceptions and amendments thereto to cover all of the above entitled cases and such bill of exceptions and amendments thereto may be filed and insofar as they are duly allowed by the said District Court shall stand as and for the bill of exceptions in District Court files numbered 459, 460 and 461 and in Circuit Court of Appeals files numbered 11300 and 11301.

(2) That the transcript of the record in each of the above entitled cases may be printed as one transcript of record and be taken and considered as the transcript of record in each of the said appeals with the same force and effect as though separate transcripts of the record were filed in each of said appeals.

(3) That by entering into the stipulation containing the foregoing provisions neither of the parties waive any rights concerning any issue of law which may be raised in either of the two separate judgments appealed from.

August 14, 1939.

A true copy.

Attest:

(Seal)
U. S. Cir. Court
of Appeals
Eighth Circuit

E. E. KOCH,
Clerk, U. S. Circuit Court of
Appeals, Eighth Circuit.

[fol. 103] (Endorsed—Certified Copy of Order of Circuit Court of Appeals Confirming Stipulation and Combining Record 459, 460-461) Filed August 17, 1939, Thomas H. Howard, Clerk, By Lyle E. Anderson, Deputy.

[fol. 104] Bill of Exceptions.

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required For the Improvement of Navigation in the Mississippi River.

(Second Cond. 32 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Appellant,

File No. 459. vs. At Law.

Certain Lands in Winona County, Minnesota; Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Appellee.

(Notice of Proposed Bill of Exceptions and Service.)

To: F. W. Root, C. O. Newcomb and A. C. Erdall, Attorneys for the above named Respondents and Appellees.

Please Take Notice, that the under-signed proposes the following Bill of Exceptions:

UNITED STATES OF AMERICA,

JOHN J. COURTNEY,
JOHN T. HARRINGTON,
Special Assistants to the Attorney General.

Service of the within proposed Bill of Exceptions is acknowledged this 2nd day of August, 1939.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Appellee.

[fol. 105] Bill of Exceptions.

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required For the Improvement of Navigation in the Mississippi River.

(L/D No. 5—Minneiska)
(Third and Fourth Condemnations)

File No. 460 At Law.
File No. 461 At Law.

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the

Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

To: F. W. Root, C. O. Newcomb and A. C. Erdall, Attorneys for the above named Respondents and Appellees.

Please Take Notice, that the under-signed proposes the following Bill of Exceptions:

UNITED STATES OF AMERICA,

JOHN J. COURTNEY,
JOHN T. HARRINGTON,
Special Assistants to the Attorney General.

[fol. 106] Be it Remembered That:

The above entitled cause, having in accordance with stipulation of the parties herein and by order of the above entitled court been duly transferred for trial to the Third Division of said court, and that said cause came regularly on for trial on the November, 1935, general term of the above named court, being the 12th day of November, 1935, at ten o'clock in the forenoon before the Honorable Joseph W. Molyneaux, one of the judges thereof, with a jury, at the Federal Building in the City of St. Paul, State of Minnesota.

There were present and appearing:

Messrs. John J. Courtney and John T. Harrington, Special Assistants to the Attorney General, on behalf of the United States of America, petitioner herein.

Messrs. F. W. Root, C. O. Newcomb and A. C. Erdall, on behalf of Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith as Successor Trustees; Western Union Telegraph Company, respondents herein.

Thereupon the following proceedings were had, and testimony taken, with reference to the subject matter of this appeal:

ROBERT C. JOHNSON, a witness called in behalf of the Government, being first duly sworn, testified:

Direct Examination.

By Mr. Courtney:

I am in the employ of the United States Engineers at St. Paul and reside at Minneapolis, I am familiar with the property that is being acquired in the so-called Whitman Pool at Dam No. 5 and with the descriptions which are con- [fol. 107] tained in the pleadings filed in the four cases. Government Exhibits Nos. 1, 2, and 3 and 4 correctly portray the properties involved in these four suits as well as the property of the Milwaukee Railroad and of the Western Union Telegraph and Cable Company. Three of these maps are drawn on a scale of 1" equals 400 feet, while Exhibit No. 3 is on a scale of 1" equals 100 feet. (The original Government Exhibits 1, 2, and 3 were received in evidence and transmitted to the Circuit Court of Appeals by order of the District Court.) The Milwaukee Railroad on each of the maps is indicated between two heavy lines by a line made up of long dashes and two dots. Exhibit No. 1 refers to the first and second condemnation and embraces the property located in Winona County. Lock and Dam No. 5 is indicated on this map. The heavy black line shown in the area marked "river" indicates the location of the lock and dam but the earth dam is now shown. The river is indicated between two heavy lines showing the shore line at the date of the survey. The arrows indicate the direction the water is flowing. Areas shown in blue on Government Exhibits Nos. 1 and 2 indicate lands to be acquired by the Government in fee simple. These are private lands as distinguished from the Railroad. On Exhibit No. 2 the part shaded in gray represents the areas within the Government meander lines. The meander line located the river on a Government survey map. It shows the location about 1850, but not necessarily now as the river in some places has accreted and at others has washed away since that time. Descriptions of property, however, refer to that within the old meander lines.

Areas tinted yellow on Exhibit Nos. 1, 2 and 3 indicate land now owned by the United States. Exhibit 3 shows the town of Minneiska on a larger scale of one inch equals 100 feet. The Whitewater River empties into the Mississippi River right at Minneiska.

Without objection Government Exhibits Nos. 1, 2, 3 and 4 were received in evidence as a description of the property on which the Government seeks an easement.

Cross-Examination.

By Mr. Erdall:

[fol. 108] The part in yellow is land owned by the United States Department of Agriculture for game preserves and things of that kind. The gray color on Exhibit No. 2 indicates the present limits of the river. In 1848 when the meander line was surveyed the Minnesota side of the river ran somewhere near the meander line shown on the map. The meander line surveyed in 1929 on the Wisconsin side is also shown.

On Exhibit No. 1 the meander line is not shown.

Exhibits Nos. 2 and 3 cover lands located in Wabasha County and are in Condemnation No. 3.

The line extending out from the edge of the river on the Wisconsin side, No. 45, 44, 98, etc., are wing dams constructed by the Government. They are wing dams to maintain the channel in a certain position. The purpose is to keep the channel away from the shore. These two dams extend down on both sides of the river to the dam.

At Minneiska, shown on Exhibit No. 2 in blue, the Government is taking fee simple title to quite a large area on the river side of the Milwaukee Railroad. Extending from Minneiska to the Whitewater River near Weaver, the Government is taking fee simple title to lands from the railroad clear over to the Mississippi River main channel. The Government is also taking fee simple title to quite an area of land upstream from the Milwaukee Railroad on the Whitewater River.

Redirect Examination.

By Mr. Courtney:

The very small figures on the maps for example, on Exhibit No. 2, show spot elevations of the land. From these elevations one can tell if the land is level, rolling, flat, or rising.

LAWRENCE W. PALMQUIST, being first duly sworn upon oath testifies as follows:

Direct Examination.

By Mr. Erdall:

I reside at Minneapolis, Minnesota. I have been employed by the Engineering Department of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company since the fall of 1928. Prior to that time I took a partial course [fol. 109] in Civil Engineering at the University of Minnesota. I started in 1932 making investigations on the effect of the nine-foot channel project in the Mississippi River insofar as the railroad is concerned and worked quite extensively upon it in 1932 and 1933. In the years 1934 and 1935 up to the present time, I have spent all of the time on the river work. I made or have had prepared under my supervision certain maps, blueprints and photographs. Among these was a map showing the limits to which the water will cover the land in the vicinity of the Mississippi River after the water is raised to the normal pool level of 660 feet above mean sea level, being a definite sea level datum used by the Army Engineers in this project. Railroad Exhibit No. 1 is a large map on the scale of 1" to 400 feet, and is a tracing of government flowage maps for the area shown. The portion in blue is the land below the normal pool elevation of 660 feet mean sea level. It is a tracing from maps prepared by the United States Engineers. I believe there were thirty-five (35) government maps traced and they cover only the portion of the pool that will affect us most materially. The 660 contours on the Government maps show the land below 660. Near the bottom of the map there are a series of lines that show United States Highway, formerly State Highway No. 3 and now United States and State Highway No. 36, and the Milwaukee Railroad. Where no work is done or proposed to be done, the railroad is shown by a heavy black dashed line. There is shown in a heavy solid black line where riprap has or will be placed. Where we have or propose to raise the grade the black changes to a red line. The yellow on the map also shows the location of riprap placed or to be placed since the dam has raised the water against our

embankment. It shows the riprap placed or to be placed on account of the pool.

The Government earth dike extending from the dam to the high ground near Buffalo City, shown in the map by a pink color, is some 18,000 feet long. The yellow along the earth dike represents the riprap placed on the earth dike by the Government. They riprapped their dike on the pool face from the toe of the slope to the top of dike.

[fol. 110] Small figures on map such as "653.1" indicate spot elevation of the ground at that point above mean sea level, or 6.9 feet below pool level.

The arrow with the letter "N" indicates north on the map. At the northerly end the dike ties into ground higher than the top of the dike. The dike at that end is at an elevation of 672. At the site of the dam the top of the dike is 670 or 10 feet above the pool level and 12 feet above the pool level at the upper end.

In low flows very little water flowed through the Belvidere or Pomme de Terre slough, but it flowed principally between the two lines running more or less parallel. A great portion of the entire bottom lands between the Mississippi River and the Belvidere slough was quite heavily timbered with the exception of a few marshy tracts. All the land shown in blue was covered with timber. The trees range from 48" in diameter down to brush. Where the base of the tree was at an elevation of 662 feet above mean sea level or less, they were cut by the Government. Some exceedingly large trees were cut at slightly higher elevations. On the map the green spots indicate land that is at elevations of 659 to 659.9. The pink spots are spot elevations of 658 to 658.9, or 1.1 feet to 2 feet below pool elevations. At some places the water is two or more feet in depth and at some other places it is over 20 feet in depth.

Railroad Exhibit No. 1 received in evidence. (The original of Railroad Exhibit No. 1 has been transmitted to the Circuit Court of Appeals by order of the District Court and a copy thereof appears at the end of this printed record.)

On the map the large structures are indicated by red lettering and an arrow down to the location of the structures.

There are, I believe, eighteen (18) small pipe culverts that have or are being changed indicated in similar red letters. For example, L-545½ in the vicinity of L-82. These culverts shown in red have or are to be changed to protect them against the raise of the water.

[fol. 111] The Court: We will take a short recess at this time.

Witness indicates on Railroad Exhibit 1 the location of Minneiska, Weaver, Bridge L-84 and the County line near that bridge dividing Wabasha County and Winona County. Everything below the Mississippi river on the map is in the State of Minnesota. To the right of the county line is Winona County and to the left is Wabasha County. Whitman is a siding on the railroad approximately ½ to ¾ miles below the dam. Minneiska and Weaver are towns and have railroad stations there.

Railroad Exhibit 2 is a track profile of the railroad between a point 2.2 miles west of Weaver down to the dam and east as far as Whitman siding. Platted to mean sea level elevation. It shows the track elevation, ground line, pool elevation, high water lines and the work that has or is to be done. A profile is merely a line of the elevation at the base of rail of the track. This is a double track railroad through the area here involved, and profile is taken at base of rail at center line of the westward main line track. It is double tracked between La Crosse and Minneapolis, and part shown on profile is all double tracked and all belongs to the Milwaukee Railroad. Trains from Chicago to Minneapolis and the Pacific Coast use the westbound track, which is the one nearest the river and trains going east use the eastbound track. Some of the important passenger trains that operate over these tracks are the Olympian, Pioneer Limited, the Fast Mail, the Riverview, the Day Express, the Hiawatha and others. The last mentioned is one of the world's fastest trains. A large number of freight trains operate over those tracks and there are also mail trains. It is the main line between Chicago and the Pacific Coast. The profile map was prepared under my supervision, from field survey, office records and Government records as to water elevations taken from Government plats.

Railroad Exhibit No. 2 received in evidence. (The original Railroad Exhibit No. 2 has been transmitted to the Circuit Court of Appeals by order of the District Court.)

[fol. 112] The base of rail is shown on Exhibit 2 by the upper solid rather fine, black line, it is quite an even line, it crosses a very irregular line at times. The irregular line is the ground line prior to the construction of the railroad. The yellow lines represent the 1880 high water, the red line labeled "pool elevation" represents the pool of Dam No. 5 with which we are concerned, and is at the elevation 660. The broken brown line at the bottom of the sketch represents the low water of 1933 which was one of the lowest stages in the Mississippi River in this area. That line extends from the dam to a point near the mouth of the Whitewater River at the town of Minneiska. At the time of the survey the main channel of the Mississippi River at Minneiska goes away from the railroad toward the Wisconsin side of the Mississippi River as shown on Exhibit 1.

The sketch on the top of the profile is drawn on a vertical scale of one inch equals 20 feet, whereas the horizontal scale is one inch equals 400 feet. The lower sketch is merely an illustration to show locations of towns, culverts, the fact that track is straight or curved the dashed line shows the railroad is running on a curve and the solid line represents straight or tangent tracks.

The railroad stationing is important as it determines [fol. 113] the limits of the riprap. By a station we mean a 100 foot stretch of track or embankment. Two or three stations of work means 200 or 300 feet of work.

The dam is at track stations 5013 plus 74 which means it is 74 feet beyond station 5013. For example, between station 5000 and 5010 there is 1000 feet. On the profile the small square or one inch horizontally represents 100 feet. The large squares of 1000 feet apart. The series of parallel lines show the river in the natural state. For example, between Station 4970 to 4900 the river is some distance away from the railroad and between Station 4860 and 4890 it is closer. On the sketch or map below the profile the yellow coloring represents riprap to be placed on the embankment. On the upper side of the track the yellow represents riprap placed or to be placed on the river

side of the railroad and below the track yellow indicates such riprap on the landward or bluff side of the track. The profile shows the location where the work has or is to be done both as to riprapping and bridges. The L-80 and L-84 have been changed and L-82 and L-90 are to be changed. Culverts L-[illegible] and L-84 have been replaced by bridges. The track has been raised near Culvert L-80 and it is shown by the red line above the original block track elevation.

Whitman is at the extreme right of Exhibit 2.

Direct Examination (Continued.)

(Palmquist)

By Mr. Erdall:

When we refer to east on our railroad we mean downriver, and west is upriver. Those are time table directions. The ground line shown on Railroad Exhibit 2 was taken from a blueprint of the construction profile and placed upon the tracing for Exhibit 2. The profile for the westbound main track shown on Exhibit 2 is based on elevations run by myself. The profile of the ground line, of course, only shows elevations along a definite line, it does not show what the ground elevation would be 2 feet or 10 feet off the line. I was unable to find the original cross sections.

[fol. 114] A cross section represents the outline of the embankment. It is the view you would get if you were to slice off or take a section out of it. On the cross-sections numbers increase going downstream. The cross sections were prepared by me from a field survey made in the fall and winter of 1933. There has been no change since that time in the railroad structures, embankments and bridges in that area.

The purpose of the cross sections is to show the present situation, or the situation before the water was raised, and what is to be done to protect the railroad against the water.

The black lines represent the outline of the actual cross sections. Green indicates bank widening to be done. Red indicates track to be raised. Yellow indicates riprap to be placed. For practical purposes the black line is the present outline of the embankment. Green is bank widen-

ing. If it is necessary to raise the track then the embankments must be widened to support the shoulder. A shoulder is necessary to support the ballast and roadbed.

The pool elevation means the surface of the water after the dam has backed the water upstream in the Mississippi River and the tributary waters. A lake will be formed, the surface of which will be 660 feet above mean sea level.

The railroad's contention is that it is necessary for them to riprap to protect their embankment to a point seven feet above the pool or up to the elevation of 667 feet above mean sea level.

Cross-Examination.

By Mr. Courtney:

Q. Mr. Palmquist, referring now to Railroad Exhibit 2, on this Exhibit 2—we will hold it this way so everyone can follow—in tracing out this line there are heavy black lines indicated as—what I have reference to is an unbroken black line. A. Yes.

Q. I am tracing it now at your station approximately L-599. Now, what does that indicate?

A. That indicates—oh, the irregular line?

[fol. 115] Q. Yes.

A. The irregular line indicates the ground line at the time of construction.

Q. That then was the elevation of the natural ground as you proceeded to build your track?

A. Yes, so far as we could ascertain.

Q. Now from what source did you get the data which is shown in this particular?

A. From the print of the construction profile.

Q. From the print of the construction profile?

A. Yes.

Q. And the broken lines that are indicated here, following along in the same general up and down fashion—they are broken lines—I am coming now in the vicinity of L-615—what does that broken line represent as distinguished from the black solid line?

A. The broken line which you have described or questioned represents the same situation.

Q. What do you mean, the same situation?

A. Well, I might explain in this way, that this railroad was once a single track railroad, and now it is a double

track railroad, and where the double track line followed the single line—I believe there is a note at the extreme right of this exhibit which shows or explains that situation. The ground line shown on the profile is the natural ground line under center line of the eastward main line, the dotted line as originally located for single track, and if followed as the eastward main line, solid line is relocated.

Q. Well, Mr. Palmquist, what I am endeavoring to ascertain from you is this: does this line, this irregular line, indicate the location of a natural ground elevation under the present railroad embankment?

A. As nearly as we can ascertain.

Q. That is, every record which you have, indicates that by following this irregular line, both the solid line and the broken line, you could point down from the center line of your present embankment and determine what the eleva-
[fol. 116] tion of the natural ground was—is that right?

Mr. Erdall: I have no objection, your honor, but as I understand, this is based upon the profile alone, or are there other records supporting it?

The Witness: The only record I have to support it is the print of the construction profile, and from that, that would answer your question "Yes."

Q. Well, the answer then to the question is "Yes," that you can take this elevation shown at any point on this irregular line projected down from the base of tracks and ascertain the elevation of the natural ground at that point?

A. Yes, I believe that is correct.

Q. Now does this profile indicate in any way where you have cut banks? A. Yes, I believe it would.

Q. Will you step over here, and illustrate to the jury and to the Court where those points are located?

A. Well, the cut, that is, a cut if you please—that is the way I would explain it—

Q. Call it a cut then.

A. Is indicated where this irregular line comes above the base of rail. However, there may have been some side-hill cut where it does not appear that way. This line is at the center line of the east bound track, and in turning this

around, one way or the other, it may not be entirely the same.

Q. Now, then, roughly, at a point on this map indicated at L-527, you have indicated on this profile a dip in the natural ground line under your embankment? A. Yes.

[fol. 117] Q. As constructed? A. Yes.

Q. You have indicated here a line which you call ordinary high water. That is this irregular line to which I am now pointing. That is correct, is it not?

A. Yes, I believe that is right.

Q. Now under this 527, and within this area which I am now outlining on the black, how much of a depth of water would there be if the water were maintained at the elevation you call the ordinary high water?

A. Well, this is in the water-course you understand of L-527, and at that place there it would have been, oh, 7, possibly a little bit better—or eight feet in depth.

Q. At that point there would have been eight feet of water. Now if you proceed up to the vicinity of L-80 at the point which I am now outlining with my pencil, where the black line goes down under the track in this fashion, how much of a depth of water would there have been at that point if the water had been maintained at the line you have marked as the ordinary high water mark?

A. Well, roughly—well, I think there might have been about 16 feet of water there.

Q. About 16 feet of water?

A. That is the maximum at the lowest point.

Mr. Erdall: What station is that?

The Witness: Well, that would be—at Station 4964.

Q. Will you indicate for the record only, the stationing at L-527?

A. The stationing at L-527, at Culvert L-527, is 4984 plus 12. However, the point about which you questioned me as to the height was at station 4987 plus about 20.

Q. The place where you said there would be nine feet of water? A. No—it is somewhere between 7 and 8 feet.

Q. Now then, as you pass over and through the line that is marked with the symbol of structure L-80, which I [fol. 118] think I can indicate here, the natural ground rolls

somewhat, and at that point the ordinary high water is, or the high water mark practically intersects and passes through what you claim was the natural ground—is that right?

A. Yes, it is very close to that line. Both lines are very near each other.

Q. Now then, coming over to this point here, to which my pencil is now directed, what station is that approximately? A. That is 4952.

Q. If the water had been raised and was maintained at the mark you call the ordinary high water mark, how much of a depth of water would there have been between the high water line and the ground line as indicated on the profile?

A. Between the ground line and the ordinary high water line as shown on this profile, it would have been somewhat over six feet.

Q. About six feet of water. Now, Mr. Palmquist, just one further question. Will you step down before the jury again please. I am indicating now the portion of this profile in the vicinity of culverts 601, 599 and 595, or between station—will you call them off?

A. Do you want those culvert designations?

Q. No, refer to the low points in this elevation.

A. Well, at the lowest point there it runs within a foot there. If you will point to that again, Mr. Courtney—

Q. Right there.

A. All right—between Stations 4796 plus 50 and 4799 plus 50—I think that hits the two low spots.

Q. On either end of that projection of the line it is within a foot of the center—is that right? A. Yes.

Q. How much of a depth of water is there at that point and between those stations, or would there be if the water [fol. 119] were maintained at the ordinary high water mark as you have shown it on this Exhibit 2?

The Court: You are referring to the high water mark of the natural river?

Mr. Courtney: Yes, your Honor.

The Court: Under natural conditions?

Mr. Courtney: The way Mr. Palmquist has reproduced it on Exhibit 2. That is, he has established a line which he says is the high water line or ordinary high water mark. That is shown on this profile, and I am asking now for the depth between that line and the lower limits of the natural ground as shown on Exhibit 2.

A. A little over six feet.
Q. About six feet of water? A. Yes.

The Court: In speaking of high water, you are speaking of the high water line before the dam was built?

Mr. Courtney: Yes, your Honor.

Mr. Erdall: Are you speaking of the high water line or the ordinary high water line?

Mr. Courtney: I am speaking about the ordinary high water mark or the line of the ordinary high water mark.

The Court: Before the dam was built?

Mr. Courtney: Before the dam was built.

Q. Now, Mr. Palmquist, your original construction profile was based on elevation from 1 to 70, or some such basis as that; that is, you used an arbitrary zero, and carried up from that to 75 or 80—is that right?
A. Yes, that is right.
Q. That is, as your original construction profile appears, it would be necessary to use some equation in order to transfer the elevations shown on your track profile to terms that would be the equivalent of mean sea level such as we are using it here? In other words, the elevation 73 as shown on your construction profile would be what in terms of mean sea level datum.
[fol. 120] A. Well, that is office data that I did not bring along, but I can find it for you. I haven't it here, although I have testified to it previously.
Q. You have testified to it? A. Yes.
Q. In other words, you add some figures to 73 or 70, as the case may be, on your construction profile, and from that

you derive the equivalent or the mean sea level for the same elevation at the same point?

A. Yes, you use an equation to arrive at the mean sea level elevation.

Q. You will get it for us sometime will you?

A. Yes, I will.

Q. Now have you, Mr. Palmquist, the construction profile of the railroad which you have reproduced on this Exhibit 2, as indicating the original ground line?

A. No, I haven't that, although the Government had such a print that is identical with it. I haven't our print here.

Q. That is, our print is identical with yours?

A. I believe so, I would tell of course upon seeing it and having an opportunity to check back from the one that I used or referred to on this Exhibit 2, of course. The Government is cutting all trees that were not more than two feet above the pool elevation. The stumps were cut off at the normal height.

Between mile lines 5 and 8 the water depths will run from 2 to 5 feet but the average would be considerably over two feet. A good portion of that was densely covered with wood.

By Mr. Courtney:

This pool is called the Whitman pool, or Pool 5. The dams are numbered downstream from the Ford Dam. The Ford Dam is Number 1, Hastings is Number 2, Red Wing Dam not yet constructed will be Number 3, the Alma Dam is Number 4, and this dam is the Whitman Dam Number 5. Dam Number 5 is about four miles below or south of the Town of Minneiska.

[fol. 121] Since this lawsuit was started, and in May, 1935, we commenced the use of some faster passenger trains. Because of this we super-elevated the curves between St. Paul and Chicago. We had trains as fast as these passenger trains and are still running these mail and express trains. They have added ballast between St. Paul and Chicago as a regular maintenance procedure.

Q. Well, Mr. Palmquist, just before we leave this railroad Exhibit 2, I believe that the record is not complete on

it. On Friday we were referring to the points between the lines which you have marked the ordinary high water mark and the original ground line, and we were indicating the depth of water at those various points. Now so that the Court and jury may understand it, the ground line that you referred to on this Exhibit 2 is on the landward side of the railroad—is that correct?

A. No, it is not.

Q. It is under the eastbound main, isn't it?

A. That is right.

Q. Well, isn't that the landward side of the embankment?

A. No. The embankment goes to the toe of the slope, which would be further landward than the center line of the track.

Q. That is true, but so far as the elevations here shown, they are nearer the land than they are the river?

A. I believe that is the fact.

Q. Well now, we omitted one point, Mr. Palmquist, in the vicinity I believe of L-82, at this point. Now will you point out to the jury; call [of], if you will please, the stationing. A. That would be 4833 on this line.

Q. 4833 at the low point. Assuming the water were maintained at the line which you indicate as being the high water mark, how much water would there have been at that point?

Mr. Erdall: Assuming the river water could get to that point?

[fol. 122] Mr. Courtney: I am not making any assumptions on that at all.

A. Approximately two feet between the ground line and the ordinary high water elevation at that point.

Q. About two feet of water at that point. Now on the scale to which this railroad Exhibit 2 is drawn, where are the elevations indicated? Are they at the top of the line or are they at the base of the line? On the scale at which this exhibit is drawn, isn't it a fact that the lines are indicated to cover the elevations of approximately one foot?

A. Yes, I believe that is true.

Q. Well, where are the actual elevations shown, at the top of the line or at the bottom of the line?

A. Well, as near as it might be platted, I would say at the center of the line.

Q. You would say at the center of the line? A. Yes.

Q. What is the equation?

A. The equation between the Railroad construction datum and the mean sea level datum, which was part of the adjustment which we are all using in this case, is 592.69.

Q. 592.69? A. Yes, sir.

Q. In other words, Mr. Palmquist, on that exhibit which was here identified by you as the original construction profile, and has been marked Railroad Exhibit 2, the elevations are shown in numbers from 1 to 80, that is to say, for example, at Station or at Culvert L-487, that elevation is shown as 75 plus 30. Well, now, tell us just how you employed that equation that I asked for a moment ago, in reconciling that profile with the mean sea level datum that we are using here?

A. We add what is shown on the profile which you just referred to, to the equation figure, which I just gave you, —592.69,—I believe that was it.

[fol. 123] Q. You know we used the figure 73 plus 30, as shown on that exhibit.

Mr. Erdall: (Interrupting) 75 plus 30.

By Mr. Courtney:

Q. Well, at 75 plus 30, or you would add 75 plus 30 as shown on that Exhibit 2 to the figure 592.69, and that would give you the mean sea level datum?

A. Yes, to make it simpler, maybe you could use 592.7; that would simplify matters.

Q. 592.7? A. Yes, that is 1/1000 of a foot.

Q. Now, this reconcilement of datum was made when, Mr. Palmquist, so that the Court and jury may understand how this equation happened to be coming into use; when was it made; just tell us the circumstances, if you please.

A. Well, I believe it was somewhat over a year ago that we definitely established the equation.

Q. Somewhat over a year ago? A. Yes, sir.

Q. Well, now, Mr. Palmquist, in describing all of the elevations that are used here, the main sea level datum,

the Government has established from time to time what is known as benchmarks, is that correct?

A. Yes, sir.

Q. And they are established at various fixed points up and down the river, and for that matter, over the whole country?

A. I believe that is correct.

Q. So that you can, when you are surveying, run your line over that known benchmark or elevation, isn't that right? A. That is what is usually done, yes, sir.

Q. And then the Government published the figures indicating what the corresponding mean sea level datum is at that particular benchmark, for example, for one, it may be 655, is that right?

[fol. 124] The Court: And by benchmark, you mean the elevation at that point above sea level?

Mr. Courtney: That is correct, Your Honor.

The Court: And you are starting this case at the Memphis, Tennessee, benchmark?

Mr. Courtney: Yes, the mean sea level datum.

The Court: Oh, the mean sea level datum.

The Witness: In other words, by a benchmark we usually refer to it as a permanent reference point.

By Mr. Courtney:

Q. Then there are several within these reaches of the river provided by this exhibit? A. Yes.

Q. So that you can go to any one of these points, and from that run your line? A. That is right.

Recross Examination.

By Mr. Courtney:

The purpose of wing dams is to keep a deep channel. In the past at some seasons of the year, navigation has stopped because of lack of water.

Redirect Examination.

By Mr. Erdall:

The wing dams all along the river have caused silting behind or downstream from the wing dams.

Witness excused.

Lawrence W. Palmquist (Recalled)

I have a record which shows the date when certain wing dams were constructed by the Government. The wing dam immediately upstream from L-84 is wing dam number 99. It was constructed in 1918.

Summarized Statement of Portions of Evidence Relating to This Appeal.

That R. J. MIDDLETON, Assistant Chief Engineer of the Railroad Company, ADOLPH MEYER, FRANCIS C. SHONEHON, witnesses for the Railroad and Telegraph Companies, and JAMES A. GRANT, EARL D. YARCHO and LEROY K. SHERMAN, [fol. 125] witnesses for the Government were each graduates of engineering schools and each had a broad experience in engineering matters which well qualified them to express opinion as to the necessity for protecting the Railroad Company and the Telegraph Company as against increased ice and water action caused by the construction and operation of Lock and Dam No. 5.

Mr. Middleton had a very broad experience in railroad designing, construction and maintenance along, in and over navigable waterways and some similar experience as to structures not owned or operated by railroads.

Mr. Yarcho had also had considerable experience in railroad designing, construction and maintenance and in construction and designing of various government structures and facilities along, in and over navigable waterways.

Mr. Meyer, Mr. Shonehon, Mr. Grant and Mr. Sherman were all engineers, specializing in hydraulic engineering with a background of experience over a wide territory. They each, in their testimony, disclosed a record of substantial experience and accomplishment in their engineering profession.

They were each well qualified to testify as to the effect of raising the water levels in the Mississippi River to the normal pool level and the effect of such pool, and the ice

and waves forming thereon, upon the Railroad and Telegraph properties.

The testimony of Mr. Middleton, Mr. Meyer and Mr. Shonehon on behalf of the Railroad Company and the testimony of Mr. Grant, Mr. Yarcho and Mr. Sherman on behalf of the Government, in many respects was not in dispute. Therefore, to avoid repetition, the testimony of all said witnesses on certain matters is set out.

They each testified in substance that they had individually inspected and made a study of the Mississippi River, its tributaries, along Pool 5, including the watersheds from [fol. 126] which water flowed through Railroad culverts and bridges into the Mississippi River in the area to be covered by Pool 5. Such study was made by each of them both prior and subsequent to the raising of water levels in the river by the operation of Lock and Dam No. 5.

They each testified they had examined the various exhibits introduced in evidence.

They all had individually in the past observed, investigated and made a study of the effect of wave, ice action and saturation of embankments including Railroad embankments upon bodies of water similar to the Mississippi River in its natural state as well as along bodies of water similar to the new artificial pool or lake known as Pool 5. That such studies included contraction and expansion of ice upon such bodies of water, the movement of loose or broken ice by wind and current and the effects thereof upon embankments and structures similar to those maintained by the railroad along the river in the area to be covered by Pool 5. Such studies also included the effect of permanent and temporary saturation of railroad embankments and the ground upon and in which Railroad and Telegraph structures and facilities rested or were located.

In the development of nine-foot navigation in the Mississippi River from Minneapolis to St. Louis, there are twenty-seven locks and dams. The first was built in 1910 or 1912 and is known as the Twin City Lock and Dam. Dam No. 2 is at Hastings. Dam No. 3 at Red Wing. Dam No. 4 is at Alma, Wisconsin. Dam No. 5 is the Whitman Dam

that we are dealing with in this particular case. Dam No. 5A will be just above Winona.

Earlier the Mississippi River was not developed as a slack water stream in navigation, but the way they managed to move boats at all was to combat the river channel by contraction work or wing dams, so that all the flow of the stream was placed in one deeper channel of the river. The wing dams shown on these maps had to do with this [fol. 127] concentration of the current, so that the higher velocities would wash the sediment further downstream and maintain the same depth so that we could have some navigation. Whatever water flows it is expending water-power and the higher velocities would wash the silt into the deep holes, if there are any. Anything that would restrict the channel between the ends of the wing dam would be helpful to navigation.

Now, the present scheme is slack water navigation; that means the Mississippi River, instead of flowing as a stream, is flowing through a series of lakes; it is a series of twenty-seven or more lakes, in addition to Lake Pepin. Lock and Dam No. 5 is built a short distance above the siding known as Whitman, and it is some times called the Whitman Dam and some times the Minneiska Dam. Officially, it is known as Dam No. 5. Where they chose the site of the dam, the width of the river, when the river was in flood and up to elevation 660, which is our pool level, the river was two miles wide from the Minnesota shore to the 660 contour on the Wisconsin side. On the Minnesota side of the Dam, there is a level esplanade, then a guide wall, a ship lock, and provision for a second lock known as an auxiliary lock. Then there are six roller gates and then twenty-eight tainter gates. A tainter gate is hung and opens up on a hinge or pivot. A roller gate rolls up. Beyond the tainter gates there is a dike shown on Exhibit 1 extending in a northwesterly direction upstream to an angle, then turning and terminating on the higher ground on the Wisconsin shore. This was so constructed apparently to prevent damage to valuable land below the dike as well as to the Burlington Railroad. The dike which

goes upstream at the angle is what is known as the bottle-neck. The whole narrowed space is the bottle neck and the Dam itself is the stopper. The dike is a massive structure. [fol. 128] The top elevation of the dike at the Dam is ten feet above the pool or above the 660 elevation and 3.4 miles upstream where it ties into the high ground on the Wisconsin side, the height of the dike is twelve feet above the pool. Sometimes there will be a head of fourteen feet against the Dam, that is, the water will be fourteen feet higher than on the other side. At extreme flood state, the water will be about one foot higher above than below the Dam. Now, when you narrow a river up as you have done in this bottle neck, the slope is greater than in a state of nature, because the water must run swifter through there. There was an additional slope of .7 of a foot.

The railroad witnesses above referred to all testified it is necessary to strengthen and support the railroad embankment in order to get flatter slopes and to get rock protection on the face of the embankment up to an elevation of at least seven feet above the pool and in the bottle-neck it should be carried higher.

Telegraph and Signal Lines.

During the trial, it was stipulated that the Western Union Telegraph Company and the Railroad Company would present a joint claim for the signal and telegraph line changes and protection and after the trial would make their own allocation as between such companies out of the total amount allowed by the Court and jury for such signal and telegraph line changes and protection.

The testimony of LESLIE B. PORTER, Assistant Superintendent of Telegraph for the Western Union Telegraph Company and the Railroad Company as well as Signal Engineer for the latter, C. A. SANDBERG, Chief Lineman for the Railroad Company and R. J. MIDDLETON in behalf of the Railroad Company and the Telegraph Company, and JAMES A. GRANT and EARL D. YARCHO in behalf of the Government disclosed the following facts:

[fol. 129] The telegraph line was on the river side of the railroad tracks along Pool 5 and the railroad signal line was located on the bluff side of the tracks. The railroad

telegraph line carries the Dispatcher's telephone and its telephone message circuits. They are important trunk lines of the railroad and Western Union Telegraph Company. The Dispatcher's telephone is used to direct the operation of trains over those tracks. There are twenty-two wires on the telegraph line and three to twelve wires on the signal line.

The signal line adjacent to Pool 5 is used for the operation of automatic block signal and train control system. The automatic block signals indicate the condition of the track ahead. The train control system causes corresponding indications to appear in the cab of the engine. The River Division of the Railroad including the particular track here involved, is the only place on the system having the automatic train control system. This signal line is very important in the daily operation of the Railroad and governs the trains in that territory. It is a busy stretch of railroad, being the mainline between Chicago and the northwest. The Western Union Telegraph lines are used for the operation of news and market service and for the transmission of commercial messages, government reports and all of the usual message business. It is an important railroad telegraph and telephone system. It is the main line of the Western Union Telegraph Company between Chicago and the Twin Cities. Any interruption in service would be serious to the Telegraph Company in their market service, news service, press reports, ticker service and commercial messages.

All of the witnesses mentioned testified the telegraph line needed protection against wave and ice action on the raised water of the new pool impounded by Lock and Dam No. 5 and because of saturation of the bank in which some [fol. 130] of the poles rested, such saturation also being caused by the raised water levels.

The railroad witnesses also testified the telegraph pole line and guy wires supporting same would interfere with and be endangered by the riprapping of the embankment of the Railroad on the river side of the tracks. The railroad witnesses testified the telegraph lines should be moved to the bluff side and consolidated with the signal lines.

The Government witnesses testified the telegraph line should remain on the river side of the railroad tracks but should there be protected against the new pool level.

The testimony was undisputed. The Railroad and Telegraph embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand river and ice action under natural conditions of the Mississippi River and its tributaries.

The testimony of each of said witnesses was that as to the portions of the Railroad and Telegraph properties included in this appeal, certain protective measures had to be taken in order that such properties could continue to be operated in the same safe and efficient manner after the raising of the water to pool level as they were operated under natural conditions of the Mississippi River. They testified that changes or protective measures had to be taken as to the signal telephone and telegraph lines but the amount and character of such changes and protective measures were in dispute. All of the witnesses testified that the impounding of the river water upstream from Dam No. 5 to the normal pool level would cause water, and, in the winter, ice, to strike the railroad embankments at a much higher elevation than under natural ordinary stages and flows of the Mississippi River. That the railroad embankments because thereof would be saturated at least up to the pool level and needed riprap (rock) protection to stabilize the embankments so as to safely carry the [fol. 131] heavy engines and trains operating on the railroad. That riprap was required to protect the railroad embankments from wave action on the new pool level and also to protect such embankments from ice movement on the pool caused by expansion and contraction in the winter and from movement of ice floes on the spring breakup caused by wind and current.

The Railroad witnesses testified in their opinion this should be accomplished by quarry run rock dumped on the embankments to an elevation of seven feet vertically above normal pool level.

The Government witnesses testified in their opinion hand-placed riprap to an elevation of five feet vertically above normal pool level would be sufficient.

They all testified that embankment protection (rock riprap) was required upon the railroad embankments at the locations where it was in fact placed and proposed by the Railroad in the areas covered by this appeal. The only dispute concerned the quantity of and elevation to which such riprap should be carried above normal pool elevation.

Culverts and Bridges

Culvert L-595 was a 20-inch iron pipe about 132 feet long and L-599 was a cast iron pipe about 120 feet long. The testimony was undisputed that the artificial raising of the water to the normal pool level made it necessary to reconstruct Culverts L-595 and L-599 at Minneiska and the cost of doing such work was agreed to by the parties prior to submission of same to the jury.

Culvert L-527 was a 42-inch cast iron pipe 92 feet long. L-80 was a concrete culvert 8 feet by 16 feet and 134 feet long. L-82 a concrete bridge as is shown. The testimony was undisputed that Culvert L-527 and L-80 and Bridge L-82 were adequate under natural water levels and flows in the Mississippi River and its tributaries, but would not be adequate when the water in the river had been raised to normal pool level of 660 feet above mean sea level. Culvert L-527 would be submerged, L-80 nearly submerged by the proposed pool level of 660 and the water level substan- [fol. 132] tially raised under Bridge L-82. The raised water levels would make these culverts and bridge less efficient than formerly. The formation of ice in the culvert and under the bridge and the deposition of silt and debris under the new pool conditions would [lesses] or destroy their effectiveness. That the raising of the water to normal pool level by the operation of Lock and Dam No. 5 made it necessary for the Railroad to reconstruct said culverts or to substitute new culverts or bridges therefor to provide for the raised water levels. The proper and economical method of making such reconstruction or substitution and the cost of same was in dispute but no longer is in same by reason of the stipulation of the parties.

MR. R. J. MIDDLETON, MR. L. B. PORTER, MR. A. E. LODGE, on behalf of the Railroad, and MR. EARL D. YARCHO, on behalf of the Government, testified fully as to the reasonable cost of all of the protective measures herein involved.

Competent and sufficient evidence was introduced by the Railroad Company and the Government to support and sustain the verdict as to the need for protecting the property of the Railroad and Telegraph Companies under the new changed conditions and to sustain the verdict as to the amount thereof as to each item of damage (included in this appeal) claimed by and allowed to the Railroad and Telegraph Companies by the jury.

The character, amount and necessity for the measures taken to protect the Railroad and Telegraph Companies from the water raised and impounded by Lock and Dam No. 5 and the reasonable cost of such protective measures is not in issue on this appeal by reason of the stipulation of the parties. For the convenience of the court said stipulations so far as material are set out below. For that reason, the voluminous testimony showing the actual protective measures taken and the cost thereof has been omitted in this Bill of Exceptions.

Stipulation of June 16, 1938, United States Circuit Court of Appeals, Eighth Circuit.

Still in appeal—Winona County, No. 459.

I.

That portion of right of way in Lot 1, Section 7 easterly [fol. 133] of Railroad Station 4978+86.5 and westerly of Station 4990+86.5 in Lot 1, Section 18, Township 108 North, Range 8 West of the 5th P. M.

II.

That portion of land lying in Lot 2 of Section 7, easterly of Station 4948+86.5 and westerly of Station 4968+86.5 in Government Lot 1, Section 7, all in Township 108 North, Range 9 West of the 5th P. M.

III.

That portion of right of way in Government Lot 2, Section 12, easterly of Station 4927+00 and in Government Lot 3, Section 7, westerly of Station 4936+00 all in Township 108 North, Range 8 West of the 5th P. M.

All situate in the County of Winona, State of Minnesota.

It is further stipulated and agreed that as to area Number 1 above, that the portion of the judgment applicable thereto is as follows:

Riprap 5918.3 cu. yds. at $1.66209	$9,836.74
Culvert L-527	2,982.47
Tel. and Tel.	472.83
Total	$13,292.04

That as to area numbered II, the portion of the judgment applicable thereto is as follows:

Riprap 8630.0 cu. yds. at $1.66209	$14,344.83
Bridge L-80	28,122.46
Tel. and Tel.	788.06
Total	$43,255.35

That as to area numbered III, the portion of the judgment applicable thereto is as follows:

Riprap 2079.1 cu. yds. at $1.66209	$ 3,455.65
Tel. and Tel.	354.63
Total	$ 3,810.28

It is agreed that the sums of money representing the various expenditures and claims in areas I, II and III represent the fair and the reasonable cost of adjusting the structures and right of way of said Railroad Company within the areas so delineated and described, and each item thereof.

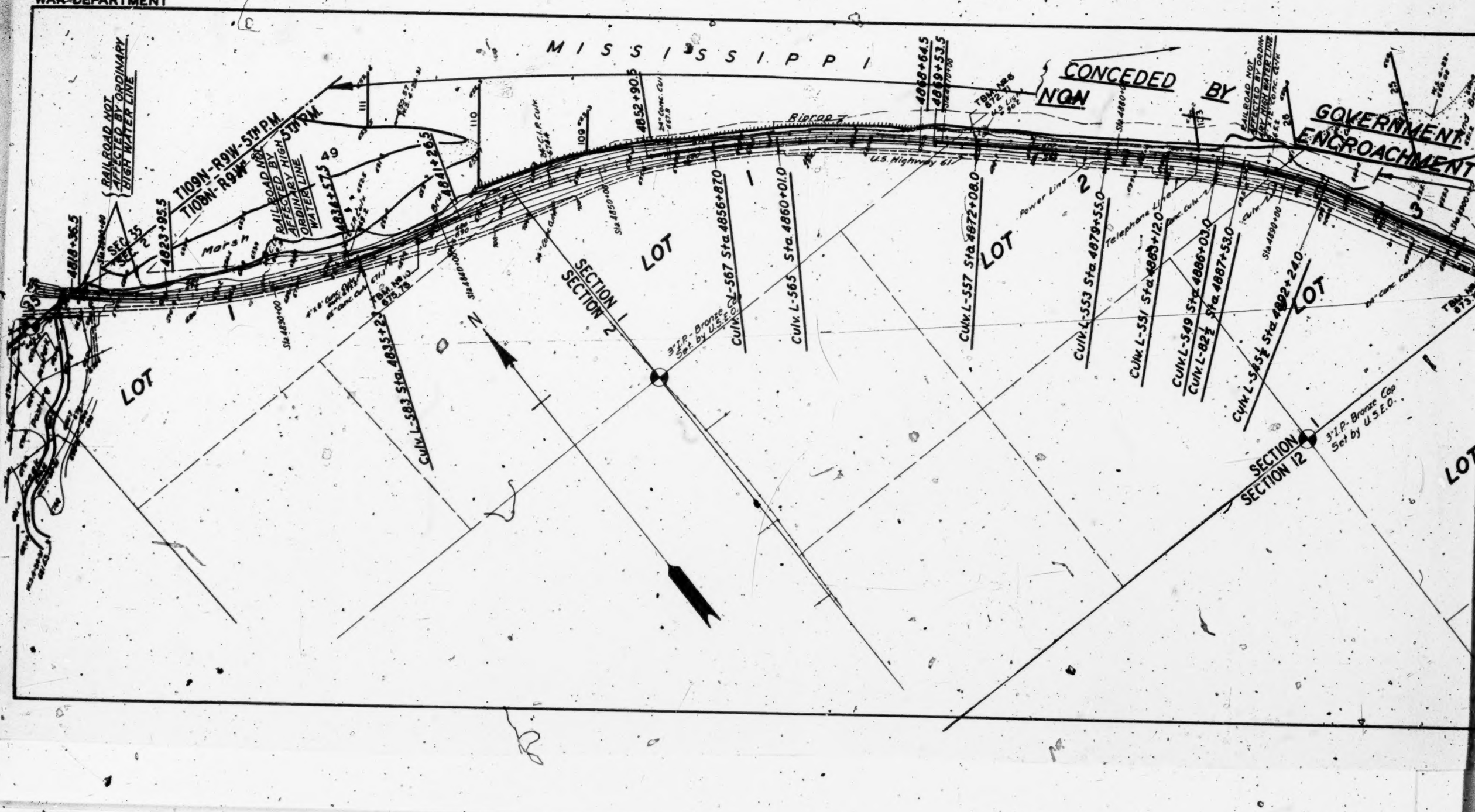
[fol. 134] It is stipulated and agreed that hereafter, either on appeal or in a new trial, as to one or all of the areas numbered I, II and III, the sums set forth shall be deemed to be the fair and reasonable cost of the above referred to.

It is stipulated and agreed that if the Court shall give effect to this stipulation, the appellant waives all assignments of Error except assignments Nos. XII and XIII and that portion of the assignments of Error which charges error in the entry of judgment thereon.

This stipulation was approved by the Court in September, 1938. The original stipulation in full with the map marked "Exhibit A", 'At Law No. 459', is on file with the Circuit Court of Appeals and a copy of said map on a reduced scale is reproduced herein.

BLANK PAGE

WAR DEPARTMENT



GOVERNMENT ENCROACHMENT TO BE

AREA

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No III

CONCEDED BY GOVERNMENT TO BE NON-ENCROACHMENT AREA

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No II

CONCEDED BY GOVERNMENT TO BE NON-ENCROACHMENT AREA

RAIL ROAD

ORDINARY HIGH WATER MARK AFFECTED BY LINE

ORDINARY

RIVER

LOT

LOT

LOT

LOT

LOT

LOT

SECTION 12

SECTION 7

SECTION 18

T 108 N R 9 W 5th P.M.

Bridge L-82 - Sta. 4920+68.0

Bridge L-80, Sta. 4957+28

U.S. Highway

Telephone Line

Power Line

Slough

Sand Bar

Willows

Mud Flat

Timber

Brush & Timber

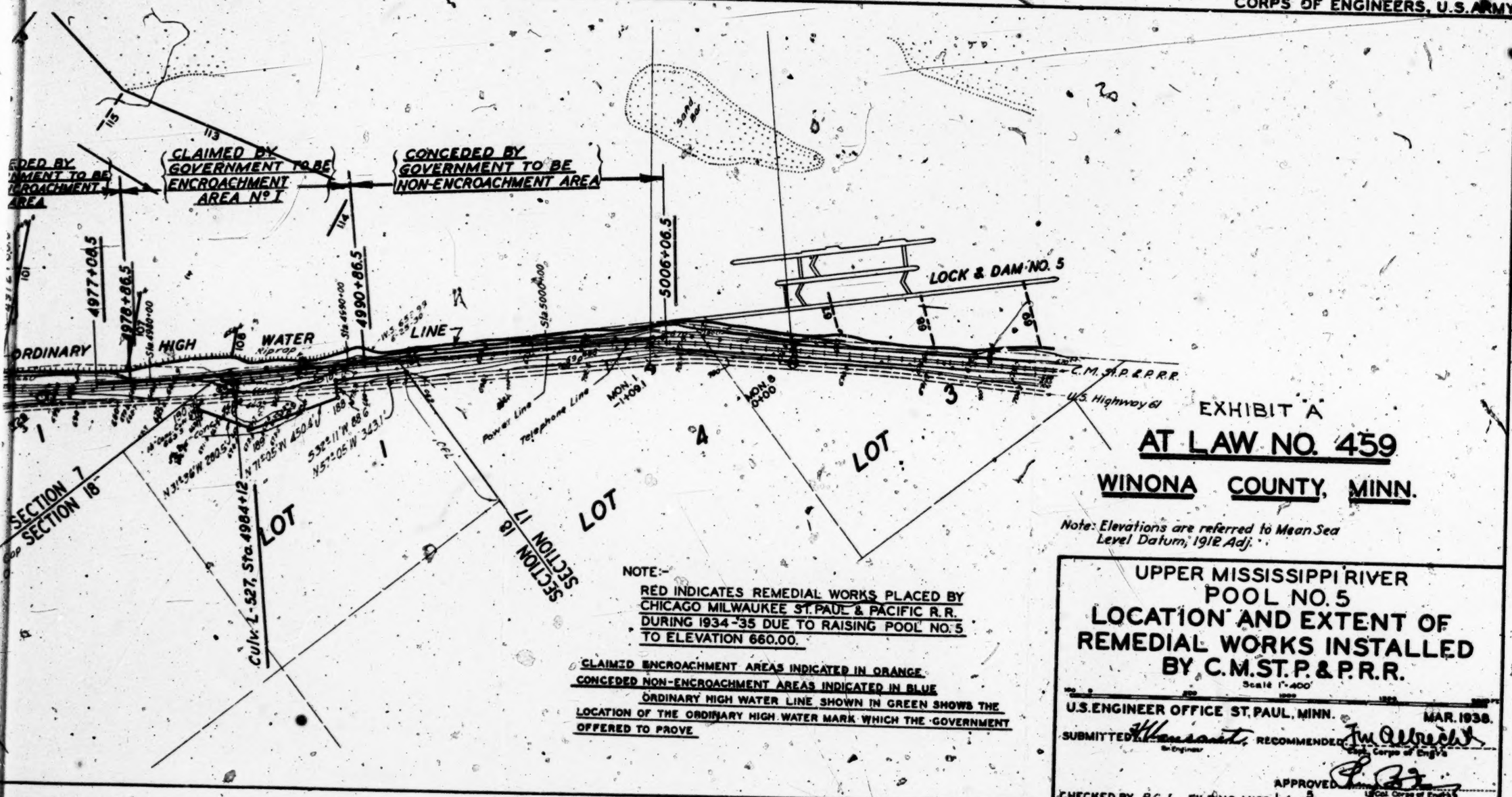
Creek

3" I.P. - Bronze Cap Set by U.S.E.O.

2" C.I. Pipe

WINONA CO., MINN.

CORPS OF ENGINEERS, U.S. ARMY



NOTE:-

RED INDICATES REMEDIAL WORKS PLACED BY CHICAGO MILWAUKEE ST. PAUL & PACIFIC R.R. DURING 1934-'35 DUE TO RAISING POOL NO. 5 TO ELEVATION 660.00.

CLAIMED ENCROACHMENT AREAS INDICATED IN ORANGE.
CONCEDED NON-ENCROACHMENT AREAS INDICATED IN BLUE
ORDINARY HIGH WATER LINE SHOWN IN GREEN SHOWS THE LOCATION OF THE ORDINARY HIGH WATER MARK WHICH THE GOVERNMENT OFFERED TO PROVE

EXHIBIT A

AT LAW NO. 459

WINONA COUNTY, MINN.

Note: Elevations are referred to Mean Sea Level Datum, 1912 Adj.

UPPER MISSISSIPPI RIVER
POOL NO. 5
LOCATION AND EXTENT OF REMEDIAL WORKS INSTALLED BY C.M.ST.P.&P.R.R.

Scale 1"=400'

U.S. ENGINEER OFFICE ST. PAUL, MINN. MAR. 1938.

SUBMITTED: _____ RECOMMENDED: _____
Dist. Engineer — Div. Engr. Corps of Engrs

APPROVED: _____
Lt. Col. Corps of Engrs

CHECKED BY R.G.J. FILE NO. MISS. L/D 180

AS REVISED MAY 6, 1938

BLANK PAGE

Stipulation of June 16, 1938, United States Circuit Court of Appeals, Eighth Circuit.

Still in appeal—Wabasha County, Nos. 460 and 461.

1. Land lying easterly of Station 4795 in Government Lot 4 and westerly of Station 4807 in Government Lot 5, all in Township 109 North, Range 9 West of the 5th P. M. Wabasha County, Minnesota.

It is further stipulated and agreed that as to the above described area, the portion of the judgment applicable thereto is as follows:

Riprap 3594.5 cu. yds. at	$1.66209	$5,974.38
Small Culverts		800.00
Tel. and Tel.		472.83
Total		$7,247.21

Whereas, it is agreed between the parties that the sum of money representing the various expenditures and claims in area referred to in Part One hereof, represents the fair and reasonable cost of adjusting the structure and right of way of said Railroad Company within the area so delineated and described, and each item thereof; and that the railroad embankment in said area so delineated and described is situated between the low water mark and ordinary high water mark of the Mississippi River.

It is stipulated and agreed that hereafter, either on appeal or in a new trial as to the area referred to in Part One hereof, the sum set forth in this stipulation shall be deemed to be the fair and reasonable cost of the various items therein referred to and no part thereof shall hereafter [fol.135] be controverted between the parties, and

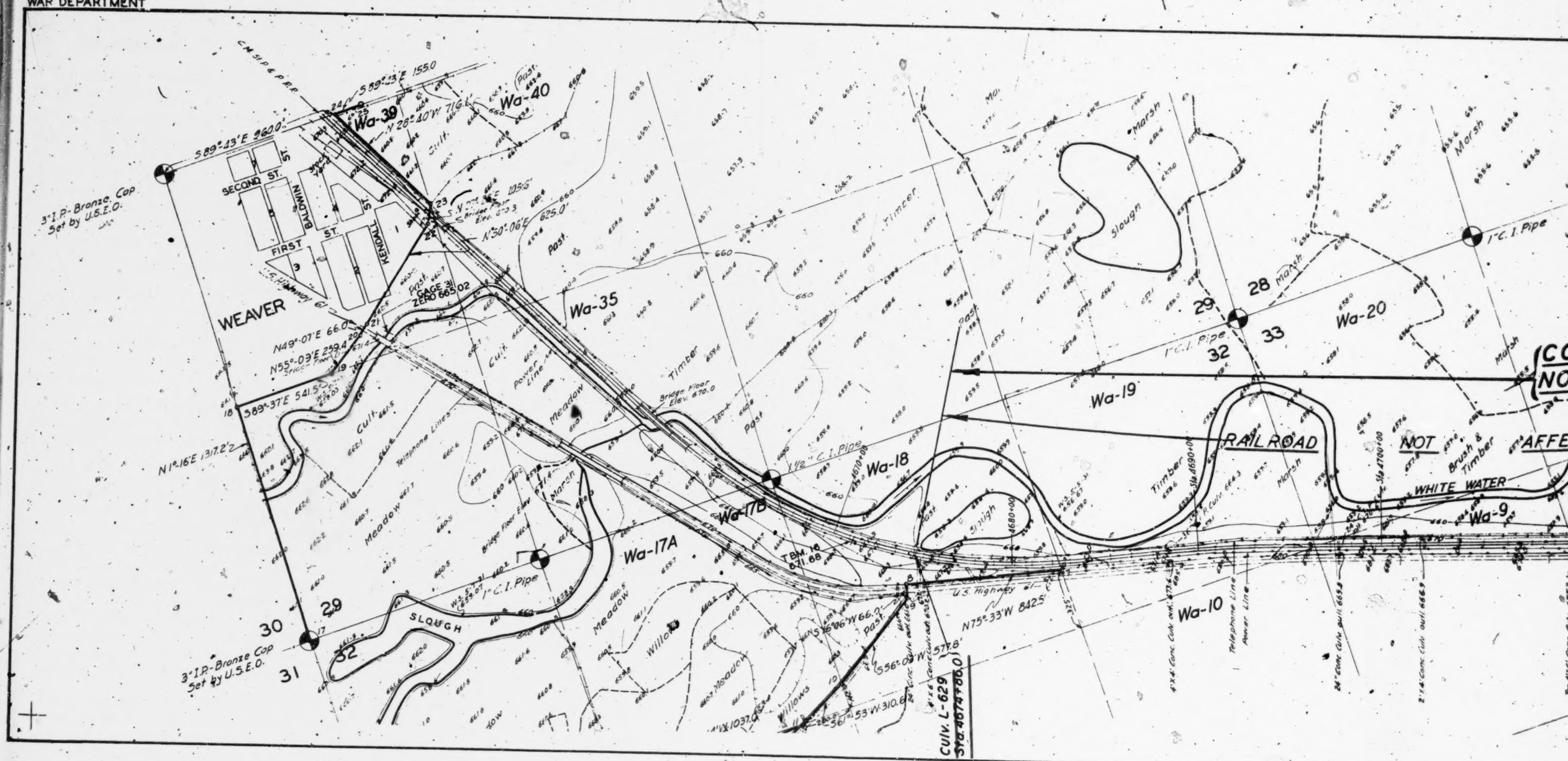
It is further stipulated that at the time of the construction of the Railroad in 1910, as well as at the time of the commencement of the instant condemnation proceedings, the railroad embankment in said area so delineated and described was placed upon land which was between the low water and ordinary high water mark of the Mississippi River, no part of which facts, either on appeal or in a new trial, as to the area referred to in Part One hereof, shall be hereafter controverted between the parties.

It is stipulated and agreed that if the Court shall give effect to this stipulation, the appellant waives all assignments of Error except assignments Nos. XII and XIII and that portion of the assignments of Error which charges error in the entry of judgment thereon.

This stipulation was approved by the Court in September 1938. The original stipulation in full with map marked "Exhibit A", 'At Law Nos. 460 and 461', is on file in the Circuit Court of Appeals and a copy of said map on a reduced scale is reproduced herein.

BLANK PAGE

WAR DEPARTMENT



CONCEDED NON AFFECTED BY GOVERNMENT ENCROACHMENT

AREA TO BE

INDIAN CREEK

WHITE WATER RIVER

Wa-4B

Wa-4A

Wa-4C to Wa-4K INC.

Wa-8

ORDINARY HIGH WATER LINE

Marsh & Brush

Brush & Scattered Woods

Cordwood (Maple)

Timber

Pasture

Cemetery

Conc. Culv.

T.B.M. 12
671.87

T.B.M. 14
665.41

Sta 4710+00

Sta 4720+00

Sta 4730+00

Sta 4740+00

Sta 4750+00

Sta 4760+00

Sta 4770+00

Sta 4780+00

Culv. L-613 Sta. 4740+41.0

4744+32.5

4753+99.5

4736+89.7

LOT 3

LOT 4

SECTION 33

SECTION 34

GREENWOOD

MARIA

LOUISA ST.

CYNTHIA ST.

WILLIS ST.

ROSE ST.

CENTRE ST.

ALLANSEN ST

WELLINGTON

ORDINARY HIGH

SECOND ST.

THIRD ST.

WALL ST.

24 AVE.

MINNEISKA

GAGE 32
ZERO = 650.0
105

Culv. L-611 Sta. 4756+43.0

Culv. L-607 Sta. 4775+59.0

Culv. L-605 Sta. 4781+19.0

Culv. L-603 Sta. 4787+41.0

Culv. L-603 Sta. 4791+03.0

Culv. L-601 Sta. 4793+77.0

Culv. L-599 Sta. 4796+09.0

Culv. L-595 Sta. 4799+48.0

3" I.P. Bronze Cap
Set by U.S.E.O.

T 10

WABASHA CO., MINN.

CORPS OF ENGINEERS, U.S. ARMY

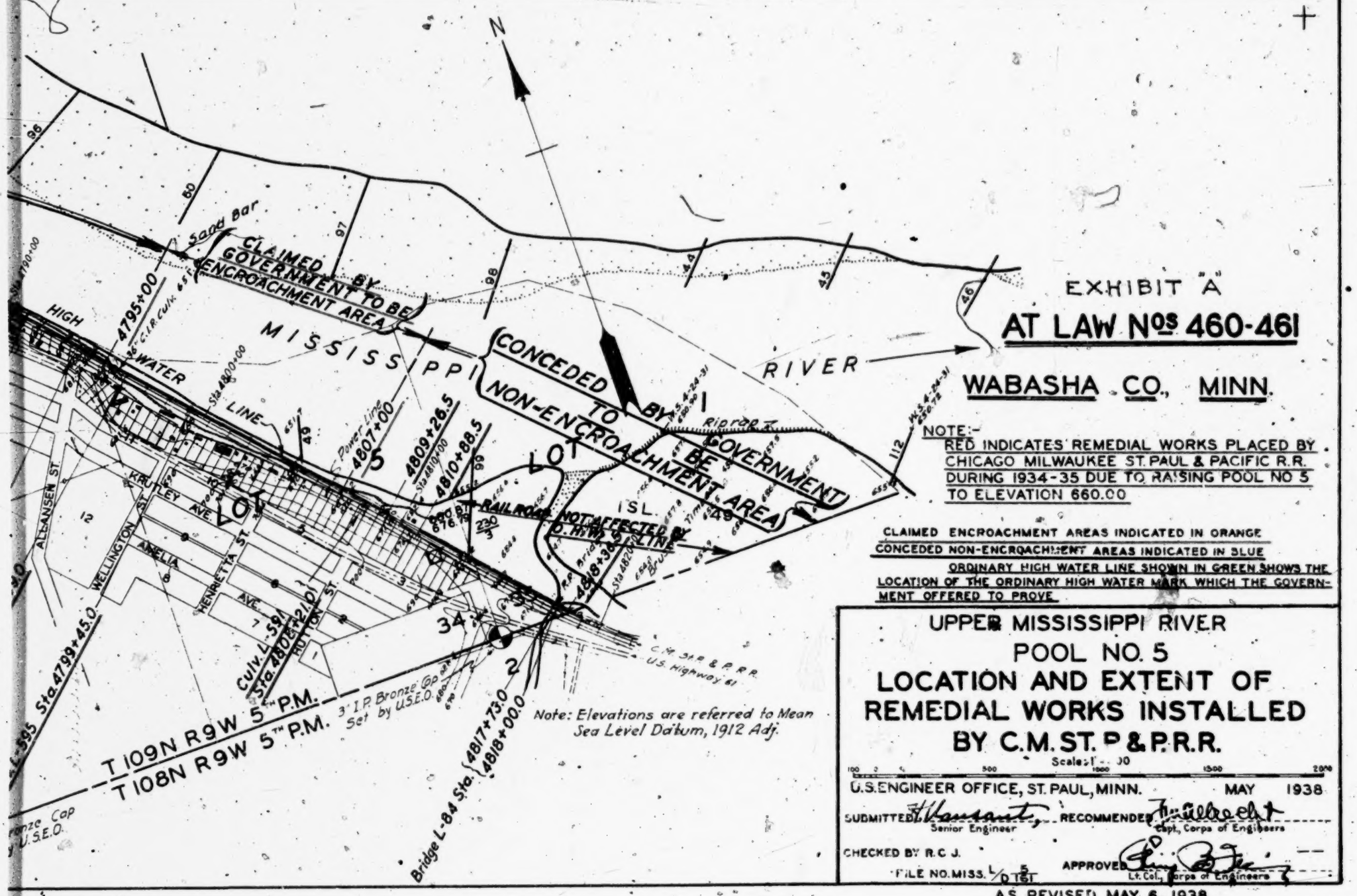


EXHIBIT "A"

AT LAW Nos 460-461

WABASHA CO., MINN.

NOTE:-
RED INDICATES REMEDIAL WORKS PLACED BY CHICAGO MILWAUKEE ST. PAUL & PACIFIC R.R. DURING 1934-35 DUE TO RAISING POOL NO 5 TO ELEVATION 660.00

CLAIMED ENCROACHMENT AREAS INDICATED IN ORANGE
CONCEDED NON-ENCROACHMENT AREAS INDICATED IN BLUE
ORDINARY HIGH WATER LINE SHOWN IN GREEN SHOWS THE LOCATION OF THE ORDINARY HIGH WATER MARK WHICH THE GOVERNMENT OFFERED TO PROVE

UPPER MISSISSIPPI RIVER
POOL NO. 5
LOCATION AND EXTENT OF REMEDIAL WORKS INSTALLED BY C.M. ST. P & P.R.R.

Scale: 1" = 500'

U.S. ENGINEER OFFICE, ST. PAUL, MINN. MAY 1938

SUBMITTED: [signature], Senior Engineer — RECOMMENDED: [signature], Capt, Corps of Engineers

CHECKED BY R.C.J.

APPROVED: [signature], Lt. Col., Corps of Engineers

FILE NO. MISS. L/D 5 TST

AS REVISED MAY 6, 1938

BLANK PAGE

Opening Statement of Counsel for Condemnor

The opening statement of Counsel for the condemnor was in part as follows:

The people of the United States have, as his Honor will declare, the right to raise waters artificially in any navigable channel to what is known as the ordinary high water mark. The evidence will disclose to you what elevation the Government from its investigation considers to be the ordinary high water mark, and because that mark is the limit to which the Government may raise its waters without the payment of any compensation to any person. Beyond that, of course, the Government has a liability.

Now, then, the next evidence that will be put before you is with respect to what the Government calls encroachments; that means encroachments upon the channel of a navigable stream in the United States, the building of structures; the building of embankments below the ordinary high water mark.

It is the position of the Government, and His Honor, The Court, will declare the Law to you, I think, that within the [fol. 136] limits of any encroachments, that is, with respect to any encroachments or any portion of the embankment which is on the public property of the United States, there can be and that there is no liability. Now, the question before you will be, to decide on the facts as to what do or do not constitute encroachments. We shall bring you the evidence of the United States Engineers as to what the original ground line was along this railroad, and, bear in mind, ladies and gentlemen, that it was constructed in 1910. There will be four encroachments claimed by the Government. The first of them will be in the vicinity of Station,—well, roughly, in the vicinity of Culvert L-527, which has been spoken of here in the evidence, or between Stations 4990 plus 86.5 to and including Station 4978 plus 86.5.

Now, you may have remembered that in the examination of one of the witnesses the question was asked with reference to the original ground line on Railroad Exhibit 2, and you may remember that the Government called out the depth of water that would exist below the water mark which is shown on this exhibit. That was for the purpose of

showing you that the structure as it is reproduced in these profiles was within an encroachment area, or on public property of the United States.

The depth of the water indicates,—now, I may say to you that the elevation of the ordinary high water mark, as it will be developed by the Government, is substantially a foot higher than that that has here been reproduced by the Railroad Company in this exhibit. (Railroad Exhibit 2.) You will also bear in mind that the Railroad Company has not as yet submitted proof to you with respect to the high water mark, and we will show you what the elevation of this ground under this fill was.

The next encroachment which the Government will have to do with, and which we will discuss in the evidence is in the vicinity of Culvert L-80, as you will observe it on the map. I shall show you, and I believe the evidence will sustain a finding that there was once, and before it was closed in by the new embankment in 1910, a part of the Mississippi River, that there was deep water there, and those stations, [fol. 137] or the limits of that encroachment are given as between 4968 plus 86.5 to Station 4948 plus 68.5, for a distance of 2,000 feet.

The next encroachment which the Government claims is slightly westerly of L-80, and is a distance of some 900 feet. For convenience, it will be referred to as farther up the bay from Station L-80, that is farther westerly in the bay; that is, between Stations 4936 and 4927, or a distance of 900 feet.

The next encroachment which the Government will claim, and which we believe the evidence will sustain, is some 1200 feet between Station 4807 to Station 4795. Now, that encroachment, in general, is located right at the town, or on a portion of the ground on which the present railway depot at Minneiska is now located. Now, the Government will endeavor to show you, first of all, from the original records where the original ground line was in each of these encroachments. We shall take The Railroad Company's own profile and show you where the natural ground line was. We shall show you that the water, or that there would have been water at the original high water mark at

each of these stations; that the Railroad Company actually built within the limits of the stream at those places.

In addition to that,—and that will be the engineering method of developing the proof,—we shall show you that that refers to the original source of the material, the Railroad Company's profiles or other records that are commonly resorted to, and if that be not enough, then we shall show you, by the evidence of residents in this community, and when I say "this community", I speak of Minneiska, —that at the time of the reconstruction of the railroad, that the railroad as it now exists at these four points was actually built in the water.

Now, I may say to you this, that the evidence will also disclose that the stationing to which I have made reference here is the outer limits of the bank, these bays or curvatures, as indicated by my hand here, that is, as far as the outer portion of these limits are concerned, or where the protective measures are concerned.

[fol. 138] Now, then, in addition to proving that to you, we feel satisfied that one method might be enough, but to prove it from the original source of the material, we will endeavor to show you by the testimony of witnesses who live in that community.

In addition to that, we shall show you that the Railroad Company itself by letters of one of its division engineers indicated the precise places to which we now make reference, as being places in which it proposed to cross the bayous and sloughs of the Mississippi River.

Now, then, as I say, with respect to these four areas, it is the position of the Government, and will be the position of the Government, that they are under no liability.

May I say to you right here, that it is not the desire of the Government to take undue advantage of the Railroad in any of these places and it is also the belief of the Government that where the use of a public domain is given that certainly when the United States seeks to use it for its own public purposes, that we ought to be, and we believe that it is under the law free of any liability.

At the close of the condemnor's opening statement, counsel for the condemnee made the following objection:

(Not in the hearing of the jury)

Mr. Erdall: If Your Honor please, we object to the materiality of any testimony on the question as to where the ordinary high water may or may not exist, for the reason that that is not material in this case; that the Secretary of War has not declared that any area in which the Railroad Company is located, in any way obstructs navigation, and Congress has not so held: On the ground that no decision of the United States Supreme Court has ever permitted the United States Government to raise water levels in any river [artificailly] without compensating the owner for any property which it may own, which is taken or partially taken by such raised waters;

[fol. 139] On the ground, that the United States Supreme Court has on several occasions specifically permitted recovery where land was located between the ordinary high water mark and the low water mark, where the rivers were [artifically] raised by Government projects; and on the ground that there is no federal decision,—

The Court: (Interrupting) Just a minute. You are asking me now to rule on that, and you are asking me now to make a ruling. If you wish to argue that matter, I had better let the jury go and let you argue it. You can do so at this time, or you can do so when the evidence is offered.

Mr. Erdall: Well, Mr. Courtney has indicated that they are going to introduce proof along the line of the ordinary high water mark, and I feel that possibly it might be desirable for us at this time to have that matter decided one way or the other.

The Court: It probably would, and I had better let the jury go and have you discuss it. Do you want to discuss it now?

(Argument by counsel for condemnor and condemnee during the course of which the following was stated.)

Mr. Erdall: If the Court please, in view of the opening statement which has been made by counsel indicating that it is the intention of Government to introduce proof to

show what the ordinary high water mark is, and will contend in this case that they are responsible only for lands and for property of the Railroad which were originally constructed upon lands which were located above the ordinary high water mark, and in view of the fact the Government takes the position as indicated in counsel's opening statement, that they are permitted to artificially raise the levels of the water of the Mississippi River and its tributaries, up to the ordinary high water mark, even though in a state of nature at many seasons of the year it would be considerably below the stage of ordinary high water mark, it is our view that the Court possibly, for the con- [fol. 140] venience of the trial of the case, should know whether or not that question should be included in this case.

The Court: Of course, they have a right to use the water to high water mark, if the river is that high, but have they got the right to artificially raise it to that height, and maintain it at that height? That is the question here.

Mr. Harrington: Well, I will answer that in this way, Your Honor, on a matter of just plain logic: If the right of the United States extends to ordinary high water for the purpose of navigation, how can they assert that right without placing a dam in the stream?

Now, if you say that the United States cannot interfere with the natural flow of the stream, then the principle that it has the right up to the ordinary high means nothing, because they cannot raise the water to ordinary high,—the Almighty God takes care of the natural flow of the stream.

The Court: Well, Almighty God sometimes raises it to the high water mark, and sometimes higher, and in those instances, the Government, of course, has the right to use it for navigation purposes, but have they the right themselves to put it that high without paying for the property that is destroyed by reason of it?

The Court: Well, gentlemen, I did ask a question of whether or not, as a matter of fact, the evidence will show that raising the water up to ordinary high water mark would have done this damage?

Mr. Erdall: I will answer that question.

The Court: If the raising of this water up to ordinary high water mark did none of the damage, but the raising of it above that did the damage, then all your discussion is of no importance.

Mr. Erdall: The only point of importance that comes in, is that, as I understand their position,—I will answer the first question that we will not be damaged by the raising of the water up to the ordinary high water mark,—I think your Honor is right in the position you have taken, but [fol. 141] their contention is that a part of our embankment area was originally built upon land which was below the ordinary high water mark, but we will not be damaged by reason of their raising the water to the high water mark, but we will be damaged by reason of their raising it above the high water mark.

The Court: If the evidence shows that, then this discussion is probably immaterial.

Mr. Erdall: Mr. Middleton just gave me a note here, and I believe he testified before the Commissioners, but he said he testified to it here, that there would be no damage if the water was raised to the ordinary high water mark. I know that will be our testimony, because that is the view of our witnesses. It is conceded by counsel for both parties that no damage would occur by raising the water to ordinary high water mark.

Mr. Harrington: Well, I don't think there will be any doubt about this, that in the encroachment areas—this may not be generally true, but it is substantially true,— that the 660 pool will raise the water six or eight feet over what we claim the ordinary high water to be.

The Court: Well, if that is true, and if it follows that raising the water up to high water mark did no damage at all, and it was done by raising it above high water mark, then this discussion is of no value except as to one point; that is, that you say that if they built, if the railroad built its road upon swampy land that was below high water mark, that they hadn't any right to land that was below high water mark, that they hadn't any right to build there, as I understand it, and that you could order them to take it off. Well, I can hardly, so far, agree with that, and my idea is that they owned to low water mark, and if

they built their railroad on land which was above low water mark, they had a right to build it there, subject to the right of the United States to flow the land up to high water mark, if that is the rule, and if they have raised the bed above high water mark, that the raising of the river up to high water mark, if it did no damage, I cannot see where the United States loses anything. That is, I would instruct, unless I am convinced differently, that the owner, the ripar- [fol. 142] ian owner, in this case the Railroad Company,—I suppose it owns the land in the river—that the riparian owner had a right to build and occupy and put structures, and to put its railroad upon land down to low water mark, subject to the right of the United States, of course, to raise the water, if your rule is right, to high water mark, and if the raising of it to high water mark did no damage, but if raising it above high water did do damage, that then the Railroad would be entitled to recover for the damages caused by raising it above high water mark on this land.

Mr. Harrington: Now we are down, I think to the gist of the whole argument. I would like to state, if there is no objection, our theory.

The Court: Of course, you understand, I have not ruled on the question of high and low, and it may be of no importance to rule on it.

Mr. Harrington: Not if the latter instruction should ultimately be your conclusion. I think that the theory of law is determinable now, and I do not see, frankly, any reason for proceeding with the trial of this cause on the basis of ordinary high water, or anything else associated with it, if your instruction ultimately will be that the Railroad Company is entitled to damages by reason of the raising of the water over ordinary high at points where the embankment itself is located below ordinary high. In other words, as previously stated, the testimony will show here that the water will be raised six or eight feet over the ordinary high level that we claim.

The Court: And that would do the damage?

Mr. Harrington: Well, it certainly will do more damage, at any rate, than the amount of flowage that would be below our claimed ordinary high; so we are down to the point now where we can determine the legal theory, but I

know it either will qualify and make material the evidence we propose to offer, or else our evidence will be ultimately immaterial to the final disposition of the case.

[fol. 143] The Court: Well, it is my impression now that this railroad had a right to build; that it owned as riparian owner to the low water mark, and that it had a right to build there, and the United States had the right to regulate the water, and to put in a dam there for the purpose, and that the railroad—if you say that the railroad is not damaged by raising it to high water mark, then I would say that the railroad could recover for damage done to the railroad where they have built upon swampy land which was above low water mark. They had a right to build there, and the Railroad Company would have a right to recover damages for raising the water above high water mark, all that was done by raising it above high water mark. That would be my idea.

Mr. Harrington: Well, may I state our position?

The Court: Yes.

Mr. Harrington: Our position is this, in substance, that the element of riparian ownership relating to the extension of title to the low water mark is, for the purpose of the issue under discussion, a purely technical title. The title, whatever it may be, is subordinate to the servitude possessed by the United States to raise the water in the Mississippi River to ordinary high. We claim that the testimony will show that four sections of the railroad embankment, of varying lengths, are built riverward from the ordinary high water mark; that such being the case, when the United States, in the improvement of navigation, raised the water in the river to or above ordinary high, any structure or embankment which is located in the bed of the river below ordinary high must suffer the consequences of the raising of the water to ordinary high, as well as above ordinary high. This conclusion must follow from the premise that under the Fifth Amendment the United States is liable only for the taking of private property. No riparian owner, whose property is located below ordinary high water, can assert a right against the United States for any compensation for the reason that he at some time possesses a private property right, in view of the permanent servitude pos-

[fol. 144] sessed by the Federal Government. Now let me demonstrate that practically if I may. Coming over here to the map; let us assume for the purpose of argument that this line is the established line of ordinary high. The Railroad embankment puts its track in the river so. Now this embankment, let us say, is built up ten feet above the surface of the water, the water level would be at ordinary high, and that there is two feet of the embankment which projects below the surface of the water. Now it is perfectly obvious that if there is a servitude extending over all of this area, so that the rights of the riparian owner are expressly subjected to having this area flooded up to ordinary high at any time the United States may proceed to so flood it for the purpose of improving navigation, this man built his embankment on the property below ordinary high, charged with knowledge that the United States may at any time commandeer that area, which it has the right to do.

The Court: Up to high water mark?

Mr. Harrington: Up to high water mark. Therefore, he places his embankment charged with that knowledge as a matter of law, and the United States is not only entitled to raise this water to ordinary high, but it has the right to exclude him entirely.

The Court: The right above ordinary high?

Mr. Harrington: No, it has the right to exclude him. For instance, the United States would have the right to say to the Milwaukee Railroad, "If your Railroad lies below ordinary high, move it out, because we will not pay you compensation. Your embankment is an obstruction. It is an obstruction because of the fact that its presence burdens navigation with monetary loss or compensation." Now I want to point out one thing more. That position must be true because if you base your ruling on the law in Minnesota that a riparian owner has a right to place an embankment in the river down to low water mark, let us go across the river and see what the situation would be in [fol. 145] Wisconsin. In Wisconsin the state law says that a riparian owner owns to the thread of the stream, and so, by the same token somebody over here at Buffalo City can build his embankment out in here, and on the prineiple that I understand your Honor to state, he would be just as

much entitled to compensation as the Milwaukee Railroad would be down in here. If that proposition is right, it seems to me the other proposition is right. There has got to be some arbitrary line to divide the public from the private right, and that line we contend is the ordinary high, not vertically, but horizontally, that is looking at it on the plane. That limits the liability of the United States and likewise limits the rights of the riparian owner.

Mr. Erdall: I might say, with reference to that situation, that Congress has not said that they need to have this obstruction removed. If there is any obstruction in the river itself, and they need it for their boats to travel on, then it would be like a bridge. They might be permitted to have it removed; but they do not contend that. They say, "No, we don't want to pay for it. You have a property right under the state law. We don't need it for navigation. We are not going to put navigation in there, but we just don't want to pay you for it." That is all their argument amounts to. The same thing over here. If the state of Wisconsin over here at Buffalo City, had built over here to the main channel of the river, and had occupied it for years as we have, and under the law of Wisconsin they were entitled to do that, there might be a right in the Government to remove it if they wanted it for boats to go in there, but if it is merely a question of saying, "We will not pay for it" I don't think there is anything to their argument. There might be a situation where they can raise the water up to ordinary high water mark. We deny that. Your Honor says you might—

The Court: Well, I have indicated that it was hardly necessary for me to rule upon it in view of the fact that there is no damage done by the raising of the water up to ordinary high.

[fol. 146] Mr. Erdall: We are not going to be damaged by reason of raising the water up to ordinary high water mark. All of our damage is going to be above that mark, because of our embankment being continually saturated by the waters at the high level.

The Court: The Railroad, if your theory is right, the high water mark theory, the Railroad cannot claim damages for raising, the water up to high water mark. The

Railroad does own the fee simple title in the land, subject of course to the right of the Government to flow it to high water mark. If the structure does not interfere with the flowing of it to high water mark, does not interfere with the channel for navigation, it seems to me they have a right to damages for flooding above high water mark.

Mr. Harrington: But it becomes an obstruction to navigation because, in order for the United States to exercise its right, for instance, in this case—

The Court: How does it become an obstruction of navigation above high water mark?

Mr. Harrington: It becomes a financial obstruction, and the financial obstruction is based on what is in the bed of the river.

The Court: Well, I will not definitely rule on it until afternoon.

Mr. Courtney: There is just one other very short statement I would like to make. I take it your position is that the damages may ensue above ordinary high water mark?

The Court: Yes.

Mr. Courtney: That we might raise to ordinary high. The position of the Government is this, that the structure is unlawful, not what is below the ordinary high water mark, but the structure—it cannot exist—this railroad structure cannot exist without the embankment being below ordinary high water. Now let us see whether this indivisible structure is lawful. The act of 1899 says, "No man can build any structure—".

The Court: No, it does not say that. It qualified it.

[fol. 147] Mr. Courtney: "It shall not be lawful to flow or in any manner—" what is this but a flowage— "or in any manner to modify the course, location, condition or position of any navigable channel."

The Court: Well, does this do that?

Mr. Courtney: Yes, your Honor.

The Court: How does it?

Mr. Courtney: Certainly it is unlawful.

The Court: Well, I can't see that. It has been the rule in all of the cases that the riparian owner can build down to low water mark, subject of course to the right of the Government to raise the waters, if your rule is right, to high water mark, and this would not interfere with the raising of it to high water mark. It only interferes with their raising it above high water mark.

Mr. Erdall: One word about Barr vs. Spaulding. That was an equity proceeding. If they had any damages in that case, they had their right to bring it under the Tucker Act. We do not contend that the Government cannot go ahead and raise the water up as high as they want to. Our contention is that when they get above the natural levels, they have got to pay for it. In this Court we are asking for damages. In that case they were trying to enjoin Spaulding, who was the officer in charge of the improvement of the river, from going ahead with the work, and the Court said that if he had any remedy, he had a remedy at law.

The Court: Well, do you wish me to make a formal ruling here now?

Mr. Courtney: Well, I have no preference in the matter; we are perfectly willing.

The Court: Well, I will say that, as I understand the position of the Railroad and Western Union Telegraph Company, that they concede that there was no damage done by raising the river to the ordinary high water mark; they claim that the damage is all done by reason of raising [fol. 148] the water above the ordinary high water mark, and therefore, that being the case, it is hardly necessary for the Court to rule on the proposition as to whether or not the Railroad is entitled to recover any damages done by the raising of the water up to the high water mark.

But, as I understand the Government's position, they claim that part of this land occupied by the Railroad Company now, and when the road was re-located, that it was located upon land of which the Railroad Company was the riparian owner, but which was land that was above the low water mark, and below the high water mark.

Mr. Courtney: No, if Your Honor please, the low water mark has not yet been established; it has not thus far been in the case.

The Court: Well, you at least contend that it was built below the ordinary high water mark?

Mr. Courtney: Below the ordinary high water mark.

The Court: And that the Railroad is not claiming any damages by raising the water up to the high water mark, but is only claiming damages by raising the water above the high water mark,—then I would say, with reference to that aspect of the case, that I will hold that the Railroad, as the riparian owner, had the right to construct its road on the lands in question, and that it has the right of recovery in this case, as it contends that there was no damage done by reason of raising the water up to the high water level, and it is only claiming damages by raising the water above the high water level; that the Railroad is entitled to recover for damages done by the raising of the water above the high water level.

Mr. Courtney: To this ruling, the Government excepts.

The Court: Yes, an exception is allowed.

Mr. Courtney: Now, if the Court please, we would also, for the purpose of the record, like to make an offer of proof.

The Court: Yes.

[fol. 149] Mr. Courtney: I presume it should be made in written form, which would probably be the most satisfactory.

The Court: You probably can do it in better shape that way; you can do it that way if you wish.

Mr. Courtney: It will require a reference to the exhibits, and we desire to make the record clear upon that.

The Court: Very well.

Mr. Courtney: I assume that for the purposes of the record, we had better call the witnesses and have them sworn, and let the objection be noted, to the ruling made.

The Court: Very well.

MAGNUS P. EKBERG.

Direct Examination.

By Mr. Courtney:

I am employed in the United States Engineer's office at St. Paul and have been so employed since the spring of 1928. Much of my time has been spent in studies in connection with the improvement of the Mississippi River for the so-called nine-foot channel, as well as other streams in the St. Paul District which includes the Mississippi River above Prairie du Chien and its tributaries. I have had occasion to observe the ordinary high water marks in the area of the river between Lock and Dam No. 5 and Alma, Wisconsin. I made a special study of such marks including those in the Pool 5 area. In this river there is a variation betwen the extreme high stage and the extreme low stage of about twenty feet, and, in rising and falling, it has an [affect] upon the banks of the stream, upon the vegetation in the valley and on the islands. There are characteristic marks which indicate where the presence and action of the water has been such as to leave a definite mark. Government's Exhibit 9 is simply a photostatic copy of Railroad Exhibit 2. I have reproduced the elevation that I determined to be the ordinary high water mark in green color on that exhibit. That line is not extended throughout the entire profile.

[fol. 150] The ordinary high water as reproduced on Government Exhibit 9 at Lock and Dam No. 5 is 652.4; at L-527 it is 652.5; at L-80 it is 652.9; directly below L-82 it is 653.1 and at the Minneiska depot it is 654.4. This ordinary high water is based upon my studies and determination in the field. The elevations of ordinary high water I have just given are reproduced on Exhibit 9 except the ordinary high water at the Dam.

The farther upstream you go, necessarily the higher the elevation of the water mark.

Cross-Examination.

Mr. Erdall: Well, I think, after looking over this exhibit here—as I understand, Government's Exhibit 9, the Court has excluded all information on here except the information showing where Mr. Ekberg claims the ordinary high

water mark is, and except insofar as that ordinary high water mark shows the location of the points where the riprap is to be placed, and the places where the culverts and bridges are located—if it is admitted only for that purpose, we will not object to it at this time. As I understand also, Mr. Harrington has stated that there is no difference of opinion between the Government and ourselves so far as our damage is concerned if it were located between a point one foot below substantially where our ordinary high water mark would be, if our proof were introduced, and the point where Mr. Ekberg, has shown it here. In view of the fact that he says that, and unless the Court permits them to go into some sort of an inquiry like that, we will have no objection to the exhibit under the ruling of the Court.

Mr. Courtney: Well, I want to make this clear; this exhibit is a photostatic copy of Railroad Exhibit 2. The only addition is the elevation of the high water mark, which is reproduced in green and is readily distinguishable. It is an exact photostatic copy of the railroad's own evidence, and I offer it not only for the purpose of showing the high water mark line as testified to by the witness, but for all purposes.

[fol. 151] The Court: That is, you also want to offer it to show what the Railroad Company's evidence already shows?

Mr. Courtney: That is right.

The Court: Well, why do you want to show it over again?

Mr. Courtney: For such use as would be convenient, for ready reference. Everything is on one sheet.

Mr. Erdall: We might just as well come out in the open. What they are contending for and the only thing they are contending for is the question of the ground line.

The Court: I will admit it so far as it shows the elevation line, that is, insofar as it shows the high water mark, everything relating to that, and for that only.

Mr. Courtney: We will except to the portion of the ruling which excludes the ground line. That is all.

Mr. Erdall: That is all.

The Court: That said four segments as constructed, were built below high water mark and above low water mark and did not interfere with the navigable portion of the stream.

Mr. Erdall: As I understand, the thing that we are contending for, respectively, is that the Government contends that a portion of the Railroad's embankments and structures in 1910 were built upon portions of the Mississippi River, which were located between low water mark and ordinary high water mark.

The Court: Yes.

Mr. Erdall: And the Railroad Company contends that they were entitled to do that, and that if that portion of its railroad is not actually needed for the navigable portion of the stream, that the Railroad Company is entitled to recover if the water is raised above ordinary high water mark against those embankments. The Government contends that if those embankments were located between low water mark and ordinary high water mark, that the Railroad Company cannot recover for those embankments no matter to what level the water is raised.

[fol. 152] The Court: As I understand, the claim of the Railroad is that those portions in two or three different sections, or at two or three different points along this area —that the Railroad was built upon the railroad's land below high water mark and above low water mark, and my instructions concerning that would be that the land owner, that is, the riparian owner, the railroad, had a right to build upon that portion and that they had a right to build to low water mark any structure, subject to the paramount right of the United States to use the river for navigation and for the improvement of navigation; and that that being so, and it being conceded that the Railroad was not damaged by raising the water to high water mark, but is liable to the Railroad for damages done to the Railroad at those points, by raising it above high water mark.

Mr. Erdall: And I presume that you mean ordinary high water mark?

The Court: Ordinary high water mark, yes.

Mr. Middleton: Then if perhaps at a later time, it becomes necessary to retry this case, we will not be estopped from introducing our own high water marks.

Mr. Harrington: No.

The Court: That said four segments, by reason of being constructed below high water mark and above low water mark constituted encroachment?

Mr. Harrington: Yes.

The Court: Is that your offer?

Mr. Harrington: That is the intention of it, the intention of our offer.

Mr. Harrington: That said four segments so constructed, constituted encroachments upon the channel of a navigable stream for the reason that said segments were constructed above low water mark and below ordinary high water mark.

The Court: That said four segments so constructed, constitute encroachments on the channel of a navigable [fol. 153] stream for the reason that said segments were constructed above low water mark and below ordinary high water mark.

The Court: Well, you can draw a stipulation and sign it, and put it in the record.

Mr. Erdall: It is further stipulated that the fact that the Railroad does not in this case offer any proof to show that the claimed encroachment areas are not located upon navigable waterways of the United States, shall not foreclose them from introducing such proof in any trial of this case.

Now, you have no objection to that, have you?

Mr. Harrington: No objection to that.

Mr. Erdall: So as not to have any misunderstanding, as I understand it, you are stating, for the purpose of this trial, that the railroad embankments were located between the ordinary high water mark and the low water mark at

the places where you claim encroachments, and you are making no claims of anything that is located below the low water mark, so far as this particular trial is concerned.

Mr. Courtney: That is correct.

Mr. Erdall: And so far as the offer of Exhibit 9 is concerned, you do not make any claim as to anything below the low water mark, for the sake of this trial?

Mr. Courtney: That is right.

The Court: Well, I think that should be in the record, because it might be misconstrued.

Mr. Courtney: And in addition to that, we both reserve the right,—no prejudice arising to either party from this position—to raise the question of the location of the low water mark at any of these points, on any other trial.

The Court: Or on this trial if it is sent back for re-trial.

Mr. Courtney: Yes, or on this trial.

The Court: Now, he has offered that exhibit; do you have any objection to that exhibit which he is offering now, subject to that, that it does not show below the low water mark.

[fol. 154] Mr. Erdall: I have not any objection to it in this trial.

The Court: Well, then, I will admit it.

(Government Exhibit 9 received in evidence.) (The original Government Exhibit 9 has been transmitted to the Circuit Court of Appeals by order of the District Court.)

Mr. Harrington: The Government offers to prove that four segments of the Milwaukee Railroad are constructed below the ordinary high water mark as previously testified to by the witness Ekberg; and we concede, without prejudice to future litigation, that each of such segments were built above the low water mark in the Mississippi River.

Mr. Harrington: And it is mutually conceded and agreed that the question of the encroachments and the legal liability which may or may not result therefrom, is a matter involving a very substantial portion of the damages claimed by the Railroad Company.

Mr. Harrington: It is understood that the following stipulation shall be copied into the record by the reporter.

In order to clarify the record and particularly the argument in which certain concessions were made by the various parties, Pages 1170 to 1258*, inclusive, and Pages 1282 to 1294*, inclusive, it is hereby stipulated that all the concessions made by the parties hereto with reference to the segments of the Railroad claimed by the Government to be encroachments shall not be binding upon the parties if the offer of proof hereinafter set out on the part of the Government shall be admitted in evidence. It is further stipulated that the concessions herein made shall not be binding upon any of the parties hereto upon a new or retrial of this case or in any other case. In any new trial or retrial of this case each party may notwithstanding any and all concessions herein, offer all competent evidence involving the so-called encroachment segments as to the correct low water mark, the correct ordinary high water [fol. 155] mark, and accretion if any along said Railroad, the question as to whether or not such segments of the Railroad and Telegraph Companies are or are not located in a navigable water of the United States and if in such a navigable water, as to whether or not such segments or any portion thereof, are obstructions or a benefit to navigation or are in fact encroachments. It is hereby stipulated by and between the parties hereto that in lieu of the concessions contained in the aforesaid pages of the transcript the following stipulation is entered into and may be incorporated in the record herein as the expression of the actual intention of the parties herein.

It is agreed that this stipulation shall not deprive either of the parties from herein proving or disapproving that the waterways along the claimed encroachments are or are not in fact navigable waterways of the United States.

It is agreed that the Railroad Company is the riparian owner in the segments involved.

---

*These references are to the pages of the transcript of the hearing where concessions were made by the parties during the course of argument.

It is agreed that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark.

The Government makes the following offer of proof:—

"The Government offers to prove that four segments of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and of the Western Union Telegraph Company, between Stations 4990 plus 86.5 to 4978 plus 86.5, a distance of 1200 feet between Stations 4968 plus 86.5 to 4948 plus 86.5, a distance of 2000 feet; between Stations 4936 to 4927, a distance of 900 feet; and between Stations 4807 to 4795, a distance of 1200 feet; are constructed on land which is located below ordinary high water mark and above low water mark. The Government further offers to prove that no Act of Congress exists consenting to the construction of the Railroad embankments at the above stated locations where the Government contends the Railroad embankments are constructed below the ordinary high water mark, although the Government concedes the embankments were constructed above low water mark, and that no authorization by, or approval of, such construction was secured from the Secretary of War or the United States Chief of Engineers other than is evidenced by Government Exhibits 69, 70 and 71. The Major Riche referred to in Government Exhibit 69 was the officer of the United States Engineers in charge of the section of the Mississippi River in which the area in question is located and that Mr. Rahme, referred to in Government Exhibit 71, was the District Engineer of the Railroad Company in charge of that part of the Railroad Company within this condemnation."

[fol. 156] That Railroad and Telegraph Companies concede that the Government possesses sufficient evidence to make it a question for jury determination as to whether the railroad was or was not in fact constructed at an elevation between low and ordinary high water mark elevations of the Mississippi River, but they do not concede that the waterway along or near the above mentioned 2000 feet and 900 feet segments respectively is a navigable waterway of the United States or one in which there is any practical

possibility of its being used as a highway by water for interstate or foreign commerce. The Railroad and Telegraph Companies also concede that their claim for damages within the limits of the aforesaid railroad stations referred to in the Government's offer of proof is a very substantial amount, being approximately one-fourth of their total claims.

The Railroad and Telegraph Companies, as well as the Trustees under the mortgages of the Railroad, object to such offer of proof upon the grounds that the fact which the Government proposes to prove is immaterial and upo the further ground that as to the 2000 foot segment between Railroad Stations 4968 plus 86.5 to 4948 plus 86.5 and the 900 foot segment between Railroad Stations 4936 and 4927 are both located along or near a waterway which is not a navigable waterway of the United States and is not a waterway in which there is any practical possibility of its being used as a highway for interstate or foreign commerce.

The Court: The objection to the offer of proof contained in the foregoing stipulation is sustained and exception allowed.

Thereafter Government Exhibits 69, 70 and 71, which are referred to in the stipulation, were marked by the reporter and offered and admitted in evidence for use in connection with the offer of proof. Counsel for the condemnee stated that he made no objection on the ground that [fol. 157] the exhibits were photostatic copies of the originals. Exhibit No. 69 is as follows:

(Exhibit 69.)

Construction of Double Track
River Div.
Dec. 17, 1909.

Major C. S. Riche,
Corp. of Engineers, U. S. Army,
Rock Island, Ill.

Dear Sir:

This company expects to double track the River Division the coming season between the present terminus of our double track at Wabasha and terminus at Richmond.

There are a number of places where we wish to improve the alignment. At a few of these places between Minneiska and La Moille, we cut across the sloughs, as shown on the map which I send in duplicate under a separate cover. These changes do not interfere with the channel and are generally across the bays or sloughs.

We went over this work recently with Captain Thompson and Major Du Shane and they thought there would be no objection whatever on the part of the Government, but we would like to get your permission to go ahead with the work, as shown on the map by the lines colored red.

Yours truly,

M. D. RAHME,
Div. Engr.

Exhibit No. 70 was the map dated November 9, 1909, showing proposed changes in alignment on the River Division of the C. M. & St. P. & P. Ry. Co. on west side of the Mississippi River from Minneiska to 3 miles east of Whitman and in vicinity of La Moille in Wabasha and Winona Counties, Minnesota, which was enclosed with Mr. Rhame's letter of December 17, 1909. (The original exhibit has been transmitted to the United States Circuit Court of Appeals for the Eighth Circuit by order of the District Court and is reproduced herein on a reduced scale).

BLANK PAGE

BLANK PAGE

Exhibit No. 71 is as follows:

(Exhibit 71.)

United States Engineer Office

Upper Mississippi River
Improvement

Rock Island, Ill.,
December 24, 1909.

[fol. 158] Mr. M. D. Rhame,
Division Engineer, C. M. & St. P. Ry. Co.
Minneapolis, Minnesota.

Dear Sir:

I have your letter of Dec. 17 requesting permission to perform certain work in double tracking and improving alignment of the River Division of the C. M. St. P Ry. on west side of Mississippi River between Minneiska and Whitman, and in vicinity of La Moille.

The map accompanying your letter, showing the proposed work, has been carefully examined and nothing having been found therein prejudicial to the interests of navigation, or in any way interfering with the proposed Government improvement of the river, this office will make no objection to your going ahead with the work, as shown on the map.

Very respectfully,

C. S. RICHE,
Major, Corps of Engineers.

Thereupon the Government called ROBERT C. JOHNSON as a witness who testified as follows: He was an employee of the United States Engineers at St. Paul, Minnesota, and that Government Exhibit 10 was prepared and constructed under his supervision; that so far as the topography there shown, it was identical with Railroad Exhibit 1; that Exhibit 10 was what is known as flowage map. There are three different colors shown. The red or pink area indicates a depth of water of one foot or less. The yellow area indicates a depth of water between one and two feet. The blue area indicates two feet or more depth of water. These are with the pool at elevation 660. This is a topog-

raphy map and in it the streams are located and the towns and any features such as railroad or roads are shown. Referring particularly to the contours which are outlined in yellow or pink, when the flowage survey was made elevation was taken at various places in the pool and using these elevation contours were drawn and the areas between these contours are indicated in colors on the map so far as to indicate the various depths of water. The white-colored [fol. 159] areas indicates land that is above water. A dashed line extending across and through the blue colored portion indicates miles above Dam No. 5. The location of the railroad right of way is indicated by a long dash and two dots.

Thereupon the Government's Exhibit 10 was offered in evidence and received. (The original exhibit has been transmitted to the Circuit Court of Appeals by order of the District Court.)

Thereafter counsel for the condemnor made the following motion:

Mr. Harrington: May it please the Court, the Government at this time presents a motion for an order dismissing from these proceedings certain sections of the railroad track in question identified by stations in the written motion.

With respect to the motion, it concerns the four segments of the Milwaukee Railroad track which were referred to in the opening statement of the Government as claimed encroachments in and on the bed of the Mississippi River.

With respect to the motion, I desire to state that the Attorney General has instructed, by a 'phone conversation, that he has been requested by the Secretary of War to dismiss these segments of the railroad track from the proceeding, and the Attorney General's instructions to us are based upon that request.

Our telephone information is that the Secretary of War's request is in the process of transmission here now, and we expected it to arrive, according to the telephone conversation, before the time came to close the case. However, it has not been received as yet, and in connection with this motion, we request permission to file that request

when it is received, which will probably be not later than tomorrow, according to our information. I will present this written motion to the Court; which has an order attached to it with the request that it be made a part of the Court's file:

[fol. 160] A motion for a directed verdict was made by the United States of America upon grounds not here material.

Written motion for order dismissing was not filed until the following day but is inserted below for the convenience of Court and counsel:

(Motion of Government For Order Dismissing From Petitions Certain Segments of Right of Way.)

Comes now the United States of America, the Petitioner herein, and moves the Court for an order dismissing from the [Petitition] for Condemnation herein in files Nos. 459, 460 and 461, all that portion or segment of the railroad right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company lying in and between the following railroad stations, to-wit:

1. Between stations 4990+86.5 to 4978+86.5, a distance of 1200 feet.

2. Between stations 4968+86.5 to 4948+86.5, a distance of 2000 feet.

3. Between stations 4936+00 to 4927+00, a distance of 900 feet.

4. Between stations 4807+00 to 4795+00, a distance of 1200 feet.

This motion will be based upon all the files, records, and proceedings in the above-entitled cause.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney,
Daniel F. Steck and
John J. Courtney,
Special Assistants to the
Attorney General.

[fol. 161] Mr. Erdall: If the Court please, this is rather a new one to me. We have been notified by the engineer who has charge of this work, to protect our railroad, stating and giving the elevations which the water was to be at the dam at Minneiska, and what the elevation was to be just below Dam Number 4, in this pool, and we have been told that the water would be raised at or shortly after April 1, 1935.

We have protected our railroad to a considerable extent,—not all of it, but a good share of it,—and it has been protected to a very considerable extent; a good share of the work has been done in these areas which they are now asking us to have withdrawn from this proceeding. We have already been damaged in a very large sum of money upon the instructions which were given to us, and which were given the public generally under that notice.

The Court: These proceedings were instituted by the United States District Attorney for this District, Mr. Sullivan, by direction of the Attorney General, under an instruction from the Secretary of War, and the petitions were filed in these proceedings under that instruction. The Secretary of War was authorized to build this dam and to take this easement in the property of the Railroad Company along by the dam, and the proceeding has gone so far that it has been heard before the Commissioners appointed by this Court, and they have made their award; the dam has been put in, and is completed, and the pool has been raised to the level where it is taking the easement required to be taken under an instruction of the Secretary of War. The Government has actually taken the easement, and as I say, the litigation has proceeded so far that the case was tried before the Commissioners and they have made their award, and there is an appeal from that award pending in this Court, and we are trying the question in this court.

It does not seem under the circumstances that the Government is entitled to dismiss this proceeding. I under-[fol. 162] stand that ordinarily the Government of the United States is entitled to abandon a proceeding for condemnation at any time it sees fit, except that it cannot take the property into its possession and creates a situation as

is created here, keeping the easement that they have already acquired, and at the same time dismiss the condemnation proceedings so that the person damaged cannot recover.

I do not believe that they are entitled to dismiss at this time, and I deny the motion.

Mr. Harrington: May we have an exception.

The Court: Yes, an exception is allowed.

Mr. Harrington: Now, I think that we have prepared to close our case.

The Court: Very well; both sides rest.

Mr. Courtney: I take it, Your Honor, that we may file the instructions of the Secretary of War, or the request of the Secretary of War, upon which this motion is based, when it does arrive, so that it may become a part of the record.

The Court: Oh, yes, you can do that.

[fol. 163] (December 18, 1935, 10 o'clock A. M.)

The Court reads its instructions to the jury as follows:

(Court's Instructions to the Jury.)

The Court: Ladies and Gentlemen of the Jury;

Technically, there are four proceedings before you; there are four appeals from the award of the Commissioners made in these condemnation proceedings, in which awards were made to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and the Western Union Telegraph & Cable Company. I shall hereafter refer to these two parties as the Railroad and the Telegraph Company.

These proceedings were instituted in the name of the United States of America, and on its behalf by George F. Sullivan, United States Attorney for the District of Minnesota, at the instance of the Attorney General of the United States and at the request and direction of the Secretary of War, duly authorized by Act of Congress of the United States under which the Secretary of War is author-

ized and directed to create a nine-foot channel in the Mississippi River, between the mouth of the Illinois River and the City of Minneapolis, and to that end to construct, maintain and operate certain locks and dams.

The Railroad's line, running from Chicago to Minneapolis, or the Twin Cities, passes by on the west side of Lock and Dam Number 5, which is hereafter spoken of. The lands on which the Milwaukee Road is built are owned by the Railroad and the telegraph lines, owned by the Telegraph Company, are placed on that road by some contract with the Milwaukee Railroad, giving therefor the Telegraph Company an interest in the road to the extent of having a right to maintain and place its poles and wires thereon.

The Railroad lands which are involved in this case are [fol. 164] shown by the deeds which they put in evidence. It is sufficient to say that the portion of the railroad involved in this case is about seven and one-quarter miles, extending from the dam westward along the side of the dam, and the telegraph wires and the right of way of the Railroad Company is situated on that land, and is about seven and one-quarter miles long.

The petition in these proceedings sets forth that the dam shall be constructed so that it will create and take a flowage easement of the crest elevation of 660 feet above mean sea level on the railroad property and embankment.

The Mississippi River is a navigable stream and it is admitted by all parties concerned in this controversy that the Railroad is the riparian owner of the lands along the Mississippi River, where the said railroad runs along the westerly side of the river, from the dam up the stream, along the entire length of the property being flowed, as before stated.

By the commerce clause of the national Constitution, Congress is empowered to regulate commerce on navigable waters and streams in the United States, and has the right to use and improve such navigable waters for the purposes of navigation, within certain limits, without compensation to the riparian owners; that is, within certain limits. In view of the fact that it has been stipulated between the par-

ties to these proceedings that no damage was or will be occasioned to the Railroad Company or Telegraph Company by reason of the water in the Mississippi River being permanently raised to the level of ordinary high water mark, by Dam Number 5, it is not necessary for the Court to instruct the jury as to such limitations; that is, the limitations that I refer to are the limitations as to taking property without just compensation,—other than to say that for all damage directly or proximately caused to the Railroad Company and the Telegraph Company, by the taking of the flowage easement from the level of ordinary high water mark to 660 feet above mean sea level, the United States is liable to the Railroad Company and the Telegraph Company. That means that so far as the Gov- [fol. 165] ernment in these proceedings takes a flowage easement in the property of the Railroad Company and the Telegraph Company above high water mark, and up to 660 feet above mean sea level, it must pay compensation for any damage it does, or for any taking. And as it is stipulated that all of the damage that has been occasioned to the properties of the Railroad Company and the Telegraph Company arises from raising the water from the level of ordinary high water mark to 660 feet above mean sea level, and that none of such damage was caused by raising the water to the level of ordinary high water mark, you have only to consider what damage was done by taking the flowage easement, aforesaid.

The Government has the right to acquire a flowage easement in the land as it is doing, in aid of navigation on the Mississippi River. It has the right to take this land, or an interest in this land by virtue of the power of eminent domain, but the Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without just compensation, and in taking this property the Government is required to pay to the owner thereof just compensation.

It will be necessary for you to determine from all of the evidence in the case, in the light of the instructions given, what constitutes just compensation for the taking of the easement which is being taken in this case, both to the Railroad Company and to the Telegraph Company.

As you have learned in the course of this trial, the Telegraph Company is interested in the telegraph line and the poles situated upon the railroad.

The claims of the Railroad and of the Telegraph Company are consolidated and are being tried here as one proceeding, and will require only one verdict, although we will also ask you for several special verdicts. The general verdict will cover both the compensation to the Railroad Company and to the Telegraph Company, to which you find they are entitled.

Just compensation for the taking of property for public use is to be measured by the loss occasioned to the owner [fol. 166] for its appropriation. The compensation must be the full equivalent of the property taken. The owner is entitled to be placed in as good a position as he would have been if his property had not been taken. The owner is entitled to receive the full market value of his property taken, the sum that would, in all probability result from fair negotiation between an owner who desires to sell but is not compelled to do so, and a purchaser who desires to buy but is not compelled to buy. The compensation is to be estimated by reference, not only to the present use of the land, but to all the uses for which the property is suitable. The value should be fixed as of the date of taking possession, which in this case was August 4, 1934. It is not proper to estimate the value of the easement taken by public necessities as to its worth to the public for the purpose for which it is taken, because it is not what the Government gains but what the owner loses, which measures the damage or compensation.

If all or any part of the land is peculiarly adopted for some particular use, that should be taken into consideration in arriving at the value.

When the owner of property has received the full market value of land taken, or the interest in land taken for all of its available uses, he has received just compensation.

In measuring the compensation to which the Railroad Company and the Telegraph Company are entitled, you should allow for the flowage easement taken by the Government, the costs of adjusting the railroad structures

and the telegraph structures, so as to meet the new conditions created by maintaining the flowage easement along the property at 660 feet above mean sea level. This may include the reasonable cost of raising and widening the embankment, riprapping the slopes of the embankment, raising or adjusting the bridges, changing and adjusting culverts, widening or raising the railroad embankment and tracks, changing the telegraph lines and other structures, which changes are made reasonably necessary by reason of the taking of said flowage easement by the Government, that is, which changes are reasonably necessary to place [fol. 167] the [the] Railroad and the Telegraph Company in as good a position after the taking as they were in before the taking.

The Railroad Company and the Telegraph Company are entitled to be placed in as good a situation after the taking of the easement as they were before. They are entitled to have the railroad property, including the culverts, bridges, and telegraph lines changed and adjusted, if that be necessary, to make the road and its property as safe for railroad purposes after the taking of the easement as it was before, and are entitled to recover in these proceedings from the Government, the reasonable cost of so adjusting the Railroad and Telegraph properties.

It has been stipulated and agreed between the parties to these proceedings, that the taking of a flowage easement upon the railroad, up to the level of ordinary high water mark will not and has not damaged the Railroad or Telegraph Companies. All of the damage that has been done to the railroad has been done by reason of taking a flowage easement above the level of ordinary high water mark and up to 660 feet above mean sea level.

[Therefor], you are instructed that neither the Railroad Company nor the Telegraph Company have in anywise been damaged or injured by the taking of the flowage easement in the property mentioned to the level of ordinary high water mark and that neither the Railroad Company nor the Telegraph Company are entitled to recover any compensation by reason of the taking of the easement up to the level of ordinary high water mark. There is no dispute about what is the ordinary high water mark in this case; that has been agreed upon by the parties.

You are instructed that all of the damage caused to said Railroad Company and Telegraph Company resulted from the taking of a flowage easement from the level of ordinary high water mark to 660 feet above mean sea level. The evidence discloses that the railroad crosses certain streams which are tributary to the Mississippi River, including the Whitewater River. The railroad is carried across these streams by means of bridges in some instances, and by means of culverts in others. These streams flow through [fol. 168] the railroad on the property of the Railroad. It is the claim of the Railroad and the Telegraph Companies that the raising of the pool by Dam Number 5 and the raising of the water to 660 feet above mean sea level along the railroad, will necessitate changes in the culverts and bridges.

(Portion of charge relating to Bridge reconstruction not in this appeal is omitted.)

You are instructed that the riparian owner of property along the Mississippi River has the right to the enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and the United States has no easement beyond the natural one, without grant or dedication, save by condemnation with appropriate compensation for the private right.

As stated before, it has been stipulated that the taking of an easement in the Railroad and Telegraph properties to the level of ordinary high water mark has not resulted in damage to the Railroad Company and the Telegraph Company's properties, and that all the damage which has resulted has been occasioned by taking an easement from the level of ordinary high water mark to 660 feet above mean sea level, and this instruction that the riparian owner of property has the right to the enjoyment of the natural flow of the river, must be modified in this case to the extent of saying that the raising of the water above its natural flow, up to the level of ordinary high water mark, has done no damage, and therefore that instruction must be modified to that extent.

You are instructed that the right to have the water flow away from bridges and culverts extending through the

railroad embankments, unobstructed except as in the course of nature, is an inseparable part of the land, and a destruction of this right is a taking of a part of the land for which the United States must make appropriate compensation to the owner of such right. But here it must also be kept in mind that the Railroad and Telegraph Companies can only recover under such circumstances if the damage occurs by reason of the water being raised in the Mississippi River above the level of ordinary high water mark. [fol. 169] That is, this instruction that the property owner, —in this case the Railroad Company and the Telegraph Company,—have the right to have these streams flow away from its property, unobstructed, as it has in the past, is modified by the stipulation of the parties that no damage was done by interfering with the natural flow of the river by raising it to the level of ordinary high water mark.

As a riparian owner on the Whitewater River, the Railroad Company and the Telegraph Company are entitled to the natural level and flow of that river in its channel and bed, as it existed prior to the artificial raising of any waters by the construction and operation of Lock and Dam Number 5, and if from the evidence you believe that Dam Number 5 will artificially raise the natural levels and obstruct the natural flow of that river, so as to require changes in the railroad embankment, its Bridge L-90, tracks and structures, or so as to require changes in its signal and telegraph lines, in order to render the same as safe and efficient as they were in a state of nature prior to the raising of such waters, then your verdict should include the reasonable cost of adjusting such property of the Railroad and Telegraph Companies to the artificial changes in the levels and flows of the Whitewater River.

Here it also must be kept in mind that the raising of the water in the Mississippi River to the level of ordinary high water mark has not resulted in any damage to said tracks and property and structures.

You are instructed that where private property is actually invaded by superinduced additions of water, earth, sand or other material, so as to effectually destroy or im-

pair its usefulness, it is a taking within the meaning of the United States Constitution.

You are instructed that the riparian owners are entitled to recover for damage done by ice and water being thrown against the property by reason of the raising of the Mississippi River above the level of ordinary high water mark. If there was any such damage caused, it is strenuously contended here by the Government that so raising the water has not occasioned any more damage by the raising of the water, and the ice, than before.

[fol. 170] You are instructed that if the impounding of the waters of the Mississippi River by the construction of Lock and Dam Number 5 makes it necessary for the Railroad Company and the Telegraph Company, respectively, to raise its tracks, to widen its embankments, to riprap its embankments, or to change the location or strengthen its bridges, culverts, signal and telegraph lines, or other structures or appurtenances, that such items are proper items for you to take into consideration in ascertaining the amount of compensation which said Railroad and Telegraph Companies are entitled to recover from the United States.

I do not think it is necessary or advisable for the Court to extend this Charge by undertaking to state to you all of the claims of the respective parties, nor their contentions concerning these claims. The two largest claims made by the Railroad and the Telegraph Companies relate to riprapping the embankment and the raising of Bridge L-90, and the tracks adjacent thereto. The claim of the Railroad for damage to Bridge L-90 is made on the theory that the bridge will finally have to be raised some three feet by reason of the deposit of sand and silt coming down the Whitewater River.

The Government claims that there will be no necessity whatever for such change; that the opening under the bridge is sufficient to take care of this river and that there will never be any substantial raising of the bed of the river at that point, at least, that there will never be any such raising as to incapacitate the bridge from taking care of the water flowing in the Whitewater River.

The hydraulic engineers and experts have testified pro and con upon the disputed claims in this respect, and it is for you to jud e who is right in that respect, bearing in mind always that the burden of proof is upon the plaintiff to establish its cause of action, and any claim for damages which it asserts.

A great deal of evidence in this case is opinion evidence as to what will eventually happen to the Railroad properties from the action of water and ice and waves, and as to what will happen to the Bridge L-90 by reason of the deposition of sand and silt. You have no right to speculate [fol. 171] on what will happen, nor base your opinion as to what will happen upon speculative evidence, but you have the right and should base your findings of fact upon the opinions of experts, given in evidence, if you are satisfied from such evidence that the opinion given is correct.

The opinions of experts are based upon a given set of facts, and are valuable as coming from learned men who are experienced in the subject, and you are entitled to consider the opinions of such men in forming your idea of what is right. Such opinions are not speculative, that is, they may be and are intended to state what will happen in this case in the future, but they are opinions of men who are basing their conclusions upon facts. They may be wrong,—in this case somebody is wrong; some of the experts are saying one thing, and the others are saying diametrically the opposite; both of them cannot be right, but it is for you to say who is right. Of course, the experts in giving their opinions, always give the reasons for their opinions, and, of course, you, in weighing their evidence and deciding between the experts, will have to consider and should consider the reasons on which they base their opinions. One opinion may be of more value than another, but it is for you to decide which is right. All I wish to emphasize by this statement is that opinion evidence is not speculative evidence. You should not speculate as to what will happen in the future, but you have the right to consider the opinions of experts which are admitted in evidence in determining what will happen in the future.

There can be but one recovery of compensation by the Railroad and Telegraph Companies for the taking of said flowage easement and all damages, present and future, which from the evidence you believe the Railroad Company and the Telegraph Company will sustain as a direct and proximate result of said taking, must be recovered in these proceedings.

Part of the work in making the changes which the Railroad and Telegraph Companies claim were made necessary has already been done, and evidence relative to that part of the work has been introduced, tending to show the actual cost and reasonable cost of the work. A large part of the work which the Railroad Company claims is ren- [fo]. 172] dered necessary has not yet been done, and the Railroad Company has introduced evidence tending to show what the reasonable cost of that work will be.

The Government has introduced evidence tending to dispute and refute the claims of the Railroad and Telegraph Companies, and tending to show that the damages were much less than claimed.

All of this evidence should be carefully considered by the jury. The Government is acquiring a perpetual right to impound the water in a pool by Dam Number 5 to an elevation that will flow the railroad by water to 660 feet above mean sea level, along the whole extent of that portion of the railroad in controversy here.

The jury in considering the damages to be allowed the Railroad and Telegraph Companies must consider that the Government is taking the flowage to the height named, without any deduction or allowance based on the possibility that the pool may be periodically lowered, because the Railroad Company and the Telegraph Company have no right to have the pool lowered, and the Government would be under no duty or obligation to lower the pool below the elevation that would flow the railroad track with water to the elevation of 660 feet above mean sea level, and after the judgment is entered in this case, it cannot be changed or any recovery had by the Railroad and Telegraph Companies, other than that recovered in these proceedings.

The Government has a right to the use of any navigable stream for navigation purposes, and to improve it for navigation purposes, and for that purpose, so far as this case is concerned, to raise the water to the level of ordinary high water, but not above it, without giving compensation.

I am saying this because it has been stipulated in this case that no damage was done by raising the river to the level of ordinary high water mark, and therefore the Government is entitled to so raise the river in this case, free from any obstruction to navigation, without giving compensation, that is, raising it to the height up to the level of ordinary high water mark.

[fol. 173] The United States is acquiring in these proceedings a flowage easement in the Railroad and Telegraph properties. An easement of flowage right is distinct and separate from a fee title or absolute title to the land. It does not mean that the Railroad and Telegraph Companies will be dispossessed or prevented from using their property in the future. The Railroad Company and the Telegraph Company will have the right to use their property as they did before, subject only to the concurrent use of the property by the Government, by flowage, up to 660 feet above mean sea level, at the railroad embankment.

I have instructed you that the burden is upon the Railroad and Telegraph Companies to establish their right to recover from the Government by a fair preponderance of the evidence. If the evidence is evenly balanced on any issue of fact, you should resolve that fact against the Railroad Company and the Telegraph Company, and in favor of the Government, for where the evidence is evenly balanced, then the Railroad and Telegraph Companies have not proven the fact by a fair preponderance of the evidence. By preponderance of the evidence and burden of proof, is meant evidence that is more convincing and credible than the evidence to the contrary. Preponderance of evidence means the greater weight or convincing power of the evidence. The preponderance of the evidence does not necessarily or wholly depend upon the number of witnesses on either side, although that is one thing to be considered, but it depends likewise upon the weight and credibility which you attach to the evidence of each witness. You may

become satisfied that the evidence of one witness may be entitled to greater weight or credibility than that of another witness, or even of several witnesses, and you may give it such weight, in determining where the preponderance lies. It is the special duty of the jury to scrutinize and weigh the evidence and determine the credibility of the witnesses. You should, as to every witness, consider his appearance, his learning, his manner of giving testimony, his frankness or evasiveness, as the case may be, his interest in the result of the trial, if any appears, his fairness or partisanship in giving his testimony, his opportunity to know the facts testified about, and all of the facts and cir- [fol. 174] cumstances appearing on this trial, which either support or discredit the testimony of the witnesses, and you should give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.

You are the sole and exclusive judges of the facts in this case, and of the credibility of the witnesses, and if the Court has said anything in this case to you which seems to indicate an opinion of the Court as to any fact, you should disregard it, for it was not the intention of the Court to do so.

It is your duty to take the law from the Court as the Court gives it to you, and apply it in arriving at your verdict.

In considering this case, you should do so dispassionately and without championing either side. Feeling always destroys the power to think straight and reason; you should not champion any side; you should calmly consider the evidence and determine the facts.

The form of verdict which will be handed to you, you will observe requires, first, a general verdict covering the whole amount which the Railroad and Telegraph Companies are entitled to recover. The claims of the respective parties have been tried jointly in this case. The form, you will notice, requires special verdicts. You will observe that these special verdicts cover every item of damage claimed by the Railroad and Telegraph Companies and their sum, of course, should equal the total amount included in your general verdict. Special Verdict Number Three will not

give you any trouble, as there the parties have agreed as to certain items, and have agreed that the damage in respect to that is $2,118.75.

You have been saved, I think, a great deal of trouble by the attorneys making a statement which they have handed to you, showing exactly what the respective claims of the parties are.

Upon reading the form of verdict, you will find that it indicates, first, that there must be a general verdict including all of the damage that you are giving to both the Railroad and the Telegraph Companies. That is included in [fol. 175] your general verdict, and that part of it reads as follows: "We, the jury in the above-entitled causes, assess the compensation to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and the Trustees under its mortgages, and the Western Union Telegraph Company, for the taking of the flowage easement described in the petition herein, and the amendment thereto, in the total sum of ..... Dollars." There, you will write in the total sum that you are allowing to these parties, the Railroad Company and the Telegraph Company. Then you are required to give special verdicts, as follows: "Included in and as a part of our general verdict, we have allowed the Railroad Company, the Trustees under its mortgages, and the Telegraph Company, the sum of ..... dollars for damages in and protection for their railroad, telegraph and signal lines." There you will insert that amount. You have a paper in your possession, each one of you, showing the respective claims of the parties in that respect.

Your second special verdict is as follows: "Included in and as a part of our general verdict, we have allowed the Railroad Company and the Trustees under its mortgages, the following amount for changes in and protection of: (a) Culvert L-527; (b) Culvert L-80; (c) Culvert L-84; (d) Bridge L-82; (e) Bridge L-90."

If you find for the Railroad and Telegraph Companies on Bridge L-90, you will write in there the amount. If you find against them, that they are not entitled to recover anything for that bridge, you will simply write in there "Nothing"; you can write in the word "Nothing", or put

it in, in such form as you see fit, indicating that you have allowed them nothing.

The third special verdict is as follows:

"Included in and as a part of our general verdict, we have allowed to the Railroad Company and the Trustees under its mortgages, the sum of $2,118.75, for changes in and protection of all the following described small bridges and culverts,"—and there they are enumerated. That item is agreed upon.

[fol. 176] And the fourth special verdict is as follows:

"Included in and as a part of our general verdict, we have allowed the Railroad Company and the Trustees under its mortgages, the sum of ..... dollars for necessary riprap and bank protection of the railroad embankment."

You will date your verdict and have it signed by your foreman. Your verdict must be by the unanimous consent of the jury.

Ladies and Gentlemen of the jury, I am going to leave you in possession of this room. The exhibits are all here, and you will therefor have the benefit of being in this room where everything is, instead of going to some juryroom. Swear officers.

Mr. Harrington: If Your Honor please, my attention has been called to the fact that notwithstanding our discussion of Monday afternoon, that we are required to take our exceptions to the Charge after it is given.

The Court: Well, I will consider that all of the exceptions that you have already taken will be considered as taken now before the jury goes out.

Mr. Erdall: That covers, of course, both parties.

The Court: That covers both parties. Swear officers.

Mr. Erdall: If Your Honor please, there is one more fact,—I think there were three of the Government Exhibits that possibly have been marked, in connection with their proof, that were not admitted. I assume that they should not go to the jury; it would just be confusing to them, and that Exhibits 60, 70 and 71.

The Court: Well, take out everything that is not in evidence.

Mr. Erdall: Well, that is agreed between the both of us, and I think that they should not be turned over to the Clerk.

Mr. Harrington: Well if Your Honor please, I am still somewhat disturbed about the status of the record. The Circuit Court of Appeals for this Circuit has said that they will not consider an assignment of error unless on the basis of the instructions,—unless it appears in the record that the exceptions were taken.

[fol. 177] The Court: Well, does not that appear in the record?

Mr. Harrington: Well, not after the Charge was given; that is the thing that is disturbing us. We have a complete record as of the Monday afternoon proceedings.

The Court: Well, gentlemen, I understood that these exceptions, and your position in that respect were put in the record, and I will consider that they are, put in the record at this point of the proceeding, and that you make the same objections now that you did then, and take the same exceptions now.

Mr. Harrington: Well, then, may that be mutually stipulated as to that understanding, Mr. Erdall?

Mr. Erdall: Oh, yes, certainly, certainly.

The Court: Now, you can swear the officers.

And the jury thereupon retired to consider their verdict. Thereupon on the 20th day of December, 1935, the jury rendered a verdict for the condemnee and against the condemnor.

Forasmuch as the matters above set forth do not fully appear of record, the appellant tenders this a bill of exceptions, and prays that the same may be signed and approved by the Judge of this Court.

Dated this 1st day of July, 1939.

(Endorsed—Proposed Bill of Exceptions 459, 460-461) Filed August 22, 1939, Thomas H. Howard, Clerk, By William H. Eckley, Deputy.

[fol. 242] Order Settling Bill of Exceptions With Amendments.

United States District Court For the District of Minnesota, First Division.

United States of America.

vs.

Certain Lands in Winona and Wabasha Counties, Minnesota; Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph Company.

File No. 459 and File No. 460-461.

The foregoing Bill of Exceptions is herewith certified and allowed as the Bill of Exceptions in this Court and comprises a record of all the material evidence in this cause and proceedings had upon the trial of this action (except exhibits referred to therein which will be forwarded to the Clerk of the Circuit Court of Appeals), said Exhibits to be and hereby are made a part of said Bill of Exceptions.

It is further ordered that the appellant herein having conceded and accepted the appellees proposed amendments numbered 1 to 5, 11 and 12, 15 to 26 inclusive, and 29, the same shall be included in the foregoing Bill of Exceptions, and the said Bill of Exceptions is hereby approved, allowed and settled, and made a part of the record herein; and Railroad's proposed amendments numbered 6-7-8-9-10, 13-14, and 27-28, are disallowed.

It is further Ordered that pursuant to the stipulation of the parties and of the Order of the Circuit Court of Appeals thereon, dated August 14, 1939, this Order shall apply with like effect to the Bill of Exceptions in file number 460-461, consolidated. Let this Order be entered Nunc

Pro Tunc for the Order of the Court dated September 7, 1939.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed): Filed September 27, 1939. Thomas H. Howard, Clerk, By William H. Eckley, Deputy.

[fol. 243] (Order For Transmission of Certain Exhibits to Appellate Court.)

United States District Court For the District of Minnesota, First Division.

United States of America,

vs.

Certain Lands in Winona and Wabasha Counties, Minnesota; Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph Company.

File No. 459 and File No. 460-461.

On motion of the United States by John J. Courtney, Special Assistant to the Attorney General, it is ordered that in addition to the transcript of record on appeal in this action that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, the following original exhibits to be by him safely kept and returned to this Court upon the final determination of this action in the United States Circuit Court of Appeals for the Eighth Circuit; namely, Government Exhibits 1, 2, 3, 9, 10 and 69-70-71, and Railroad Exhibits 1 and 2.

It is further Ordered that said exhibits need not be printed in the record.

Dated this 27th day of September, 1939.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed) Filed September 27, 1939, Thomas H. Howard, Clerk, William H. Eckley, Deputy.

[fol. 244] (Praecipe For Transcript.)

To the Clerk of the Above Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in each transcript of record:

1. Petitions for Condemnation in File No. 459 and File No. 461, dated December 30, 1933, excepting Exhibit "C" and excepting therefrom such parts of Exhibits "A" and "B" as do not pertain to the Railroad easement.

2. Orders Granting Condemnation and Appointing Commissioners, dated April 14, 1934, Files Nos. 459 and 461.

3. Orders Granting Immediate Possession, File No. 459 and File No. 461.

[fol. 245] 4. Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph Company, filed April 8, 1935, in File No. 459 and File Nos. 460-461.

5. Notices of Appeal from Award of Commissioners in File No. 459 and File Nos. 460-461, dated May 4, 1935, by the United States.

6. Verdict on Appeal, dated December 21, 1935, in File Nos. 459, 460-61.

7. Stipulation for Division of Verdict and Form of Entry of Judgment, in File Nos. 459, 460-61, dated January 3, 1936.

8. Judgment, dated January 6, 1936.

9. Petition and Order Allowing Appeal in File No. 459, dated April 6, 1936, and Petition and Order Allowing Appeal in File No. 460-61, dated August 10, 1936.

10. Assignments of Error in File No. 459, dated April 6, 1936, and Assignments of Error in File No. 460-461, dated August 10, 1936, omitting from each "all Assign-

ments of Error save and except Assignments Nos. XII and XIII, and that portion of the Assignment of Errors which charges error in the entry of judgment thereon", in accordance with the Order of the Circuit Court of Appeals herein, dated September 10, 1938, in each cause.

11. Notice of Appeal in File No. 459, dated April 6, 1936, and Notice of Appeal in File No. 460-61, dated August 10, 1936.

12. Citation in File No. 459, dated April 6, 1936, and sundry extensions noted, and Citation in File No. 460-61, dated August 10, 1936, and sundry extensions noted.

13. Motion and Order thereon in Circuit Court of Appeals dismissing portion of appeal and reforming judgment dated September 10, 1938, in File No. 459 and in File Nos. 460-61.

14. Mandates, dated September 10, 1938, in File No. 459, and File Nos. 460-61.

15. Stipulation combining record on appeal in File No. 459, and File No. 460-61.

16. Order of Circuit Court of Appeals, conforming stipulation and combining record, dated August 14, 1939.

17. Bill of Exceptions, in File Nos. 459, 460-61, combined.

18. Order Settling Bill of Exceptions, by Nordbye, J., dated September 7, 1939.

19. Order of Circuit Court of Appeals denying Appellees Motion for Supplemental Bill of Exceptions, dated September 15, 1939.

[fol. 246] 20. Railroads proposed amendments numbered 1-2-3-4-5, 11-12, 15-16-17-18-19-20-21-22-23-24-25-26 and 29, conceded by Government and allowed to Government's proposed Bill of Exceptions, and Railroad amendments 6-7-8-9-10, 13-14 and 27 and 28 disallowed.

21. Order of Nordbye, J., settling Bill of Exceptions, Nunc Pro Tunc, dated September 27th, 1939, with amendments allowed.

22. Order of Nordbye, J., for transmission of Exhibits, dated September 27th, 1939.

23. Designation of Portions of Record or Praecipe.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Eighth Circuit, printed under the supervision of said Clerk of the Circuit Court of Appeals for the Eighth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

Dated this 25th day of September, 1939.

JOHN J. COURTNEY,
Special Assistant to the
Attorney General.

Service of the above praecipe accepted and acknowledged this 27th day of September, 1939.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Appellees.

(Endorsed—Praecipe, 459, 460-461) Filed September 27, 1939, Thomas H. Howard, Clerk, By William H. Eckley, Deputy.

[fol. 247] (Clerk's Certificate to Transcript.)

United States District Court, District of Minnesota,
First Division.

I, Thomas H. Howard, Clerk of Said District Court, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 246 pages, numbered consecutively from 1 to 246 inclusive, is a true and complete transcript of the record and proceedings in said causes, wherein the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, is Petitioner, and Certain Lands in Winona County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph and Cable

Company, et al., are Respondents; and the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, is Petitioner, and Certain Lands in Wabasha County, Minnesota, containing 3140 acres, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., are Respondents; and the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota is Petitioner, and Certain Lands in Wabasha County, Minnesota, containing 1960 acres, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., are Respondents, and of the whole thereof (except as modified by the praecipe herein to be found at page 244 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citations together with proof of service thereof. I also transmit original Exhibits as provided in the Order for Transmission of Exhibits to be found at page 243 herein.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Winona, in the First Division of the District of Minnesota, this 18th day of October, A. D. 1939.

(Seal)
U. S. Dist. Court
Dist. of Minnesota
First Division

THOMAS H. HOWARD, Clerk,
By Mamie A. Bredeson, Deputy.

Filed Oct. 21, 1939, E. E. Koch, Clerk.

[fol. 248] (Order Denying Motion of Appellees for Allowance of Supplemental Record from District Court.)

United States Circuit Court of Appeals
Eighth Circuit

May Term, 1939.

Friday, September 15, 1939.

United States of America, Appellant,
No. 11,300. vs.
Certain Lands in Winona County, Minnesota, et al.

Appeal from the District Court of the United States for the District of Minnesota.

and

United States of America, Appellant,
No. 11,301. vs.
Certain Lands in Wabasha County, Minnesota, et al.

Appeal from the District Court of the United States for the District of Minnesota.

On notice there is this day presented to the Court motion of appellees for the allowance of a supplemental record from the District Court, and after hearing counsel in support of and in opposition to said motion, Mr. A. C. Erdall appearing for appellees, and Mr. John J. Courtney, Special Assistant to the Attorney General, for appellant, and the Court having duly considered the motion and opposition thereto, It is now here Ordered by this Court that the said motion be, and the same is hereby, in all respects denied.

September 15, 1939.

[fol. 249] (Order of U. S. Circuit Court of Appeals granting Motion to Omit Government's Exhibits 1, 2, 3 and 9, and Railroad Exhibit 2 from Printed Record, and Directing that Copies of Railroad Exhibit 1 be Inserted in Seven Copies of Printed Record, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1939.

Monday, January 22, 1940.

United States of America, Appellant,
No. 11,300. vs.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.

Appeal from the District Court of the United States for the District of Minnesota.

United States of America, Appellant,
No. 11,301. vs.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.

Appeal from the District Court of the United States for the District of Minnesota.

Comes on for consideration by the Court the motion for an order, as to Government's Exhibits 1, 2, 3 and 9, and Railroad Exhibits 1 and 2, relieving appellant from the requirement of reducing and printing the same as required by Rule 12 of this Court, with supporting affidavit to the effect that to require inclusion of Railroad Exhibit 1 in the printed record would serve only to delay argument of these appeals and that the Court would be better informed and aided by use of the original Railroad Exhibit 1 which was used before the District Court.

Counsel for appellees have filed objection and supporting affidavit to said motion, especially as relates to Railroad Exhibit 1 and allege that the material portion of Railroad Exhibit 1 can be reproduced in the same colors as the original upon a reduced and accurate scale, all to the end that said exhibit can in convenient form be made a part of the printed record, and appellees offer, at their sole expense to so reproduce said exhibit.

After due consideration of the motion and objection, with affidavits, It is ordered by the Court that the motion of appellant be, and is hereby granted, except as to Railroad Exhibit 1, and as to said exhibit, It is ordered that appellees have reproduced and furnish to the Clerk of this Court seven copies on exact reduced scale for inclusion in the printed record but omitting from such reproduction the portion covering the Whitewater River Valley along the Whitewater River above Railroad Bridge L-90 of said river [fol. 250] which it is alleged is not involved in or material to the issues remaining in these appeals. To enable counsel for appellees to have such seven copies of said Railroad Exhibit 1 made, It is further ordered by this Court that the Clerk of this Court transmit said original Exhibit 1 to Mr. A. C. Erdall, one of the attorneys for appellees, at Minneapolis, Minnesota, to be safely kept by him during progress of making copies, and after having completed said seven copies the original exhibit shall be delivered to the Clerk of the District Court of the United [—] for the District of Minnesota, at St. Paul, for delivery to the Clerk of

this Court at St. Paul upon his arrival there in attendance upon the May Term 1940 of this Court.

And it is further ordered by this Court that the seven copies of said Exhibit 1 be used by the Clerk of this Court to have completed a like number of copies of the printed record by inserting same therein, and that five copies of the record with said exhibit inserted be retained by the Clerk for the use of the Court and his office, and that one copy each of the record with said exhibit be furnished to counsel for appellant and to counsel for appellees.

January 22, 1940.

BLANK PAGE

BLANK PAGE

[fol. 1] (Order For Omission of Government's Exhibit 10 from Printed Record.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1940.

Monday, March 25, 1940.

United States of America, Appellant,
No. 11,300. vs.
The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.

United States of America, Appellant,
No. 11,301. vs.
The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.

Appeals from the District Court of the United States for the District of Minnesota.

In these causes motion has been filed by counsel for appellant for leave to omit Government's Exhibit No. 10 from the printed record, the original of which has been ordered by the District Court to be transmitted to this Court, and which exhibit through inadvertence was omitted from the motion of appellant heretofore filed in these causes and ruled on by order of this Court under date of January 22, 1940. The Court being informed that said Exhibit 10 is so large that it is believed to be impossible to reduce and print in such manner as to render it intelligible to the Court, and that it is not likely to be relied upon in the argument, if at all, It is now here ordered by this Court that said Exhibit No. 10 may be omitted from the printed record in these causes and that it may referred to as a physical exhibit, if necessary, at the time of the hearing and submission of these cases.

March 25, 1940.

[fol. 1a] (Stipulation to Amend Transcript of Record.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, Appellant,
No. 11,301. vs.
Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., Appellees.

Whereas, upon the trial of the above-entitled cause (known as File Nos. 460 and 461 at Law, Consolidated, First Division, District of Minnesota) a verdict was rendered by the jury on December 20, 1935, and an order was entered on January 4, 1936, extending the time for the filing of a motion for a new trial herein; and

Whereas, a judgment was entered herein by the District Court of Minnesota on January 6, 1936; and

Whereas, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., thereafter did file their motion for a new trial, which said motion was denied by the District Court on May 12, 1936, and thereafter on August 10, 1936, the United States of America filed its appeal from [fol. 2] said judgment to this Court; and

Whereas, the praecipe for transcript in this appeal (R. 173) requested the clerk to include in the transcript of the record to be filed in this Court "motion and order thereon in Circuit Court of Appeals dismissing portion of appeal and reforming judgment dated September 10, 1938, in File No. 459 and in File Nos. 460-461," which said papers through error or accident were omitted from the printed record on appeal which motion contained the facts hereinbefore recited relating to the motion for a new trial made by the appellees, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., herein.

Now, Therefore, It Is Stipulated and Agreed by and between the respective parties that pursuant to the provisions of Rule 75(h) of the "Rules of Civil Procedure for the District Courts of the United States" the facts relating to the motion made by appellees, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., for a new trial, which was denied on May 12, 1936, are to be deemed a part of the

printed record on appeal in this case as if the motion for dismissal of a portion of the appeal and the reformation of the judgment referred to above had been set forth in full in the printed record on appeal.

And It Is Further Stipulated and Agreed, provided that the Circuit Court of Appeals does not order otherwise, that it shall be sufficient if the original of this stipulation, together with such copies as may be deemed necessary, [fol. 3] shall be filed with the clerk of the Circuit Court of Appeals not later than the filing of appellees' brief in this cause.

Dated this 19th day of March, 1940.

UNITED STATES OF AMERICA,
By Norman M. Littell,
Assistant Attorney General.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, HENRY A. SCANDRETT, WALTER J. CUMMINGS and GEORGE I. HAIGHT, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, UNITED STATES TRUST COMPANY OF NEW YORK, as Trustees, GUARANTY TRUST COMPANY OF NEW YORK and MERREL P. CALLAWAY, as Trustees, THE NATIONAL CITY BANK OF NEW YORK and WILLIAM W. HOFFMAN, as Trustees, CHEMICAL BANK AND TRUST COMPANY and HOWARD B. SMITH, as Successor Trustees, WESTERN UNION TELEGRAPH COMPANY,
By F. W. Root, C. O. Newcomb, &
A. C. Erdall, Their Attorneys.

(Endorsed): Nos. 11,300-1. Stipulation to Amend Transcript of Record. Filed in U. S. Circuit Court of Appeals on April 2, 1940.

[fol. 5] (Order For Filing of Stipulation to Amend Transcript of Record, For Filing of Additional Record and Printing Thereof.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1940.

Tuesday, April 2, 1940.

United States of America, Appellant,
Nos. 11,300-1. vs.
Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., Appellees.

Appeal from the District Court of the United States for the District of Minnesota.

This matter coming before the Court on the matter of a stipulation to amend the transcript by adding thereto "motion and order thereon in Circuit Court of Appeals dismissing portion of appeal and reforming judgment dated September 10, 1938, in File No. 459 and in File Nos. 460-461," and the stipulation providing that it shall be sufficient if the original thereof together with such copies as may be deemed necessary shall be filed with the Clerk of this Court not later than the filing of appellees' brief herein, and the Court being fully advised,

It is Ordered that the stipulation shall be filed and the transcript amended as provided therein; that this additional record may be filed on or before the time of the filing of the brief of appellees herein; and that such copies shall be printed and in the number required by the Rules of this Court for Transcripts.

April 2, 1940.

And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz:

(Appearance of Mr. Daniel F. Steck as Counsel for Appellant in Cause No. 11300.)

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 11300

UNITED STATES OF AMERICA, APPELLANT

vs.

CERTAIN LANDS IN WINONA COUNTY, MINNESOTA, ET AL.

The Clerk will enter my appearance as Counsel for the Appellant.

DANIEL F. STECK,
Special Assistant Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Nov. 29, 1938.

(Appearance of Mr. John J. Courtney as Counsel for Appellant in Cause No. 11300.)

The Clerk will enter my appearance as Counsel for the Appellant.

DANIEL F. STECK,
JOHN J. COURTNEY,
Special Assistants to the Attorney General,
216 Federal Courts Bldg., St. Paul, Minn.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Dec. 1, 1938.

(Appearance of Mr. Victor E. Anderson as Counsel for Appellant in Cause No. 11300.)

The Clerk will enter my appearance as Counsel for the Appellant.

VICTOR E. ANDERSON.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Dec. 6, 1938.

(Appearance of Mr. John T. Harrington and Mr. J. W. Wasserman as Counsel for Appellant in Cause No. 11300.)

United States Circuit Court of Appeals, Eighth Circuit
No. 11300

UNITED STATES OF AMERICA, APPELLANT

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

The Clerk will enter my appearance as Counsel for the Appellant.

DANIEL F. STECK,
JOHN J. COURTNEY,
JOHN T. HARRINGTON,
Special Assistants to the Attorney General.
J. W. WASSERMAN,
Attorney, Department of Justice,
VICTOR E. ANDERSON,
U. S. Attorney, District of Minnesota, of Counsel,
216 Federal Courts Building, Saint Paul, Minn.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Oct. 28, 1939.

(Appearance of Mr. Jacob N. Wasserman as Counsel for Appellant in Cause No. 11300.)

The Clerk will enter my appearance as Counsel for the Appellant.

JACOB N. WASSERMAN.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 4, 1940.

(Appearance of Mr. Lawrence S. Apsey as Counsel for Appellant in Cause No. 11300.)

The Clerk will enter my appearance as Counsel for the Appellant.

LAWRENCE S. APSEY,
Attorney, Department of Justice,
Washington, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, May 9, 1940.

(Appearance of Counsel for Appellees in Cause No. 11300.)
United States Circuit Court of Appeals, Eighth Circuit
No. 11300
UNITED STATES OF AMERICA, APPELLANT
vs.
CERTAIN LANDS IN WINONA COUNTY, MINNESOTA, ET AL.

The Clerk will enter my appearance as Counsel for the Appellees.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL.
25 Milwaukee Station, Minneapolis.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Nov. 11, 1939.

(Appearance of Mr. Daniel F. Steck as Counsel for Appellant in Cause No. 11301.)

United States Circuit Court of Appeals, Eighth Circuit

No. 11301

UNITED STATES OF AMERICA, APPELLANT
vs.
CERTAIN LANDS IN WABASHA COUNTY, MINNESOTA, ET AL.

The Clerk will enter my appearance as Counsel for the Appellant.

DANIEL F. STECK,
Special Assistant Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Nov. 29, 1939.

(Appearance of Mr. John J. Courtney as Counsel for Appellant in Cause No. 11301.)

The Clerk will enter my appearance as Counsel for the Appellant.

DANIEL F. STECK,
JOHN J. COURTNEY,
Special Assistants to the Attorney General.
216 Federal Courts Bldg., St. Paul, Minn.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Dec. 1, 1938.

(Appearance of Mr. Victor E. Anderson as Counsel for Appellant in Cause No. 11301.)

The Clerk will enter my appearance as Counsel for the Appellant.

VICTOR E. ANDERSON.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Dec. 6, 1938.

(Appearance of Mr. John T. Harrington and Mr. J. W. Wasserman as Counsel for Appellant in Cause No. 11301.)

United States Circuit Court of Appeals, Eighth Circuit

No. 11301

UNITED STATES OF AMERICA, APPELLANT

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO., ET AL.

The Clerk will enter my appearance as Counsel for the Appellant.

DANIEL F. STECK,
JOHN J. COURTNEY,
JOHN T. HARRINGTON,
Special Assistants to the Attorney General,
J. W. WASSERMAN,
Attorney, Department of Justice,
V. E. ANDERSON,
U. S. Attorney; District of Minnesota, of Counsel,
216 Federal Courts Building, Saint Paul, Minnesota.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Oct. 28, 1939.

(Appearance of Mr. Lawrence S. Apsey as Counsel for Appellant in Cause No. 11301.)

The Clerk will enter my appearance as Counsel for the Appellant.

LAWRENCE S. APSEY.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 4, 1940.

(Appearance of Counsel for Appellees in Cause No. 11301.)

United States Circuit Court of Appeals, Eighth Circuit

No. ~~11300~~ 11301

UNITED STATES OF AMERICA, APPELLANT

vs.

CERTAIN LANDS IN WABASHA COUNTY, MINNESOTA, ET AL.

The Clerk will enter my appearance as Counsel for the Appellees.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
25 Milwaukee Station, Minneapolis, Minn.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Nov. 11, 1939.

Order of Argument

United States Circuit Court of Appeals, Eighth Circuit

May Term, 1940

Tuesday, May 14, 1940

No. 11300

UNITED STATES OF AMERICA, APPELLANT

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

Appeal from the District Court of the United States for the District of Minnesota

and

No. 11301

UNITED STATES OF AMERICA, APPELLANT

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

Appeal from the District Court of the United States for the District of Minnesota

These causes, Nos. 11300 and 11301, having been called for hearing in their regular order, are argued together, and argument

was commenced by Mr. Lawrence S. Apsey, Attorney, Department of Justice, for appellant, continued by Mr. A. C. Erdall for appellees, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

Order of submission

May Term, 1940

Wednesday, May 15, 1940

These causes, Nos. 11300 and 11301, having been called for further hearing, argument was resumed by Mr. A. C. Erdall for appellees and concluded by Mr. Lawrence S. Apsey, Attorney, Department of Justice, for appellant.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit
No. 11300. May Term, A. D. 1940

UNITED STATES OF AMERICA, APPELLANT

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Minnesota

No. 11301. May Term, A. D. 1940

UNITED STATES OF AMERICA, APPELLANT

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Minnesota

[July 30, 1940]

Mr. Lawrence S. Apsey, Attorney, Department of Justice (Mr. Norman M. Littell, Assistant Attorney General, Mr. John J. Courtney, Special Assistant to the Attorney General, and Mr.

Jacob N. Wasserman, Attorney, Department of Justice, were with him on the brief), for Appellant.

Mr. A. C. Erdall (Mr. F. W. Root, Mr. C. O. Newcomb, Mr. A. N. Whitlock and Mr. C. S. Jefferson were with him on the brief), for Appellees.

Before GARDNER and SANBORN, Circuit Judges, and COLLET, District Judge.

SANBORN, Circuit Judge, delivered the opinion of the Court.

These appeals are from judgments awarding compensation to appellees in condemnation proceedings brought by the United States to acquire the right to flood—above Government Dam No. 5 in the Mississippi River—the right-of-way and embankment of the appellee Railroad Company upon which its tracks and the telegraph line of the appellee Western Union Telegraph and Cable Company are located. These judgments included compensation for four segments of embankment, and the structures thereon, in Wabasha and Winona counties, Minnesota, and the appeals relate only to the awards made for damages to those segments and structures.

The railroad of the appellee Railroad Company between St. Paul, Minnesota, and Chicago, Illinois, was constructed in 1870. Through Wabasha and Winona counties it followed generally the west bank, or rather the westerly margin of the bottom lands on the west side, of the Mississippi River. In 1910 the roadbed was realigned and double-tracked. In the counties referred to, the four segments of the railroad embankment were built on lands which were then below the ordinary high-water mark of the river, but above the ordinary low-water mark. Before these segments were built, the Railroad Company had submitted to the United States Engineer in charge of the portion of the river affected, a map showing the proposed location of the realigned roadbed, and had been advised by him that the Company might proceed with the work, the proposed realignment not having been found to be "prejudicial to the interests of navigation, or in any way interfering with the proposed Government improvement of the river."

In 1933 proceedings were commenced by the United States to condemn flowage easements upon lands affected by the higher levels created by Lock and Dam No. 5 built near Minneiska, Minnesota. This dam is one of a series of dams erected in carrying out the Upper Mississippi federal navigation project authorized by the Rivers and Harbors Act of July 3, 1930 (c. 847, 46 Stat. 927) as amended. The purpose of the project is to provide a nine-foot channel from Minneapolis, Minnesota, to the mouth of the Missouri River by building a series of dams with locks, to

create slack-water pool navigation in the upper Mississippi River. (See United States v. Chicago, B. & Q. R. Co., 8 Cir., 82 F. 2d 131; United States v. Chicago, B. & Q. R. Co., 7 Cir., 90 F. 2d 161.) The levels of the pools created by the dams are above the ordinary high-water levels of the river. The pool level above Dam No. 5, along the four segments of the embankment of the Railroad Company which are involved in these appeals, was from six to eight feet above the ordinary natural high-water mark of the river. That necessitated the removal by the Government of the trees and brush from the bottom lands lying between the navigable portion of the river and the railroad embankment, and exposed the embankment to wind, wave and ice action. It is conceded that the appellees were obliged to strengthen and protect the railroad embankment and the structures used in connection therewith, to make them safe and adequate under the changed conditions created by the dam. In the condemnation proceedings the Railroad Company and the Telegraph Company were awarded, by Commissioners, damages estimated to cover the reasonable cost of protecting their properties against the increased levels. The Government appealed from the awards. The issue of damages was tried to a jury in the court below.

Upon the trial, counsel for the Government in his opening statement asserted that the Government would introduce evidence to show that four segments of the railroad embankment had been built on land which laid below ordinary high-water mark, and that consequently the Government was not liable for any damages for injuries done to those segments. Opposing counsel objected upon the ground that such testimony would be immaterial. The Government did not contend that the land upon which any segment of the railroad embankment was built was below ordinary low-water mark or that the Railroad Company did not own it, or that it constituted any obstruction to the actual navigation of the river, except "that its presence burdens navigation with monetary loss or compensation."

The appellees disclaimed any damage to their properties from the raising of the level of the river to its ordinary high-water mark, but contended that, under the law, they were entitled to compensation for the damage to their properties caused by the flooding of the railroad embankment above ordinary high-water mark, without regard to whether it was located on lands above or below that level.

The court ruled that the Government had the right to flow the appellees' embankment and structures up to ordinary high-water mark without incurring liability to pay compensation; but that, since the embankment and structures did not interfere with navi-

gation, the Government would be liable for damages caused by the flooding above ordinary high-water mark. The court sustained an objection to the offer of the Government to prove that the four designated segments of embankment—three in Winona County and one in Wabasha County—were constructed on lands lying between the ordinary high-water mark and the ordinary low-water mark, and that Congress had not consented to such construction, and that it had not been expressly authorized or approved by the Secretary of War or the United States Chief of Engineers. The verdict of the jury covered damages for the four segments, which were referred to throughout the litigation as "encroachment areas." These damages, it is conceded, represented the reasonable cost of strengthening and protecting, in these areas, the railroad embankment and the structures of the appellees so as to make them safe for use at the higher levels of the river created by Dam No. 5.

The Government questions only its liability to the Railroad Company and to the Telegraph Company for any compensation, or, in other words, asserts that the flooding of the railroad embankment in these four areas did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States, which prohibits the taking of private property for a public use without compensation.

One of these appeals involves the three "encroachment areas" in Winona County, and the other appeal involves the one "encroachment area" in Wabasha County. The appellees concede that when the Government acquired the right to flood the railroad embankment, the "encroachment area" in Wabasha County was upon land lying below the ordinary high-water mark of the river and above the ordinary low-water mark. They do not concede that the "encroachment areas" in Winona County were so situated, but acknowledge that it would be a jury question whether they were or not. For the purposes of this opinion, we shall assume that the "encroachment areas" are all upon lands lying below ordinary high-water mark and above ordinary low-water mark.

The Government concedes that the Railroad Company has title to the lands in suit. It contends, however, that in building the segments of the embankment on lands below ordinary high-water mark, the Railroad Company did not comply with the provisions of Section 9 of the Rivers and Harbors Act of March 3, 1899 (c. 425, 30 Stat. 1151, 33 U. S. C. § 401), which provides: "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in * * * any navigable river * * * until the consent of Congress to the

building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War"; that therefore these embankments are unlawful structures; and that, in any event, the Railroad Company's title to its lands lying below the ordinary high-water mark was so limited and qualified that the appellees are not entitled to compensation for the flooding of the embankments constructed thereon.

Assuming that Section 9, above quoted, was applicable to the structures built by the Railroad Company, it is not apparent to us how the mere failure to obtain the formal consent required by that section could defeat the right of the Company to compensation, under the Fifth Amendment, for the taking of its property for a public use. If the property had been subject to the right of the Government to flood it in the interests of navigation, without the payment of compensation, the consent of Congress to build the embankments would not have deprived the Government of that constitutional right. (Louisville Bridge Co. v. United States, 242 U. S. 409.) On the other hand, we think the failure of the Railroad Company to obtain the statutory consent to build an embankment which in no way interfered with or obstructed navigation would not deprive the appellees of any right to compensation which, under the Fifth Amendment, they would otherwise have had. (Compare Jacobs v. United States, 290 U. S. 13, 17–18, and Converse v. Portsmouth Cotton Oil Refining Corp., 4 Cir., 281 F. 981, 986.) In Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., 99 F. 2d 902, 909, we said:

"Unless Congress, therefore, should find it necessary in the regulation of commerce to abolish riparian rights it has no power to do so. Nothing in the statute [§ 9, c. 425, 30 Stat. 1151], nor in its administration by the Chief of Engineers and the Secretary of War, nor in subsequent acts of Congress gives any support to the contention that Congress ever intended to take away such rights. Indeed the decisions of the Supreme Court rendered since 1899 disclose that such riparian rights, subject to the power of Congress to regulate their use to conform to the requirements of interstate commerce, are recognized by the federal government since the passage of that Act the same as they were before. See United States v. River Rouge Improvement Co., 1926, 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339; United States v. Chandler-Dunbar Water Power Co., 1913, 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063; Lewis Blue Point Oyster Cultivation Co. v. Briggs, 1913, 229 U. S. 82, 33 S. Ct. 679, 57 L. Ed. 1083, Ann. Cas. 1915 A, 232. The statute is intended only to protect the paramount

right of the United States to control the use of the river in the interest of navigation."

It is to be noted that the Government for thirty years has made no objection to the location of the portions of the railroad embankment in suit. It does not now object to their location, but merely objects to having to pay for the injuries done to them by the dam.

The question which we are required to decide is this: Where a riparian owner of land bordering upon a navigable river, only a portion of the entire bed of which is used and useful for purposes of navigation under natural conditions, has built an embankment upon that part of his land lying between the ordinary high-water mark and the ordinary low-water mark of the river, which embankment does not interfere with or obstruct navigation, can the United States, for the purpose of improving navigation, build a dam in the river which raises its waters above their natural level and which floods the riparian owner's embankment, without incurring any liability to compensate him for injuries caused solely by raising the waters of the river above their natural level?

The Government contends that it has the right, in aid of navigation and without payment of compensation, to take or destroy property in the river bed; that this right extends to all property lying between the ordinary high-water marks projected horizontally from shore to shore; that the right of the United States thus to take or destroy property in the river bed without paying compensation includes those portions of such property which are situated above the ordinary high-water mark, and extends to intangible riparian rights, including the right to the natural level, width and flow of the stream.

The appellees contend that in Minnesota the fee title of a riparian owner extends to ordinary low-water mark, subject to the paramount public right of navigation under the natural conditions of the stream; that the servitude of riparian lands to the public right of navigation is confined to the natural widths, levels and flows of the river, and that when the Government imposes a more onerous servitude than that upon such lands, it must pay for what it takes.

The weakness of the Government's position in this case is that it artificially created the situation out of which the claims for compensation here involved arose, by erecting a dam which has destroyed the natural condition of the river, and has imposed upon the lands of riparian owners a servitude that such lands would not otherwise have had to bear. If the servitude to which

the riparian lands of the Railroad Company is subject is as great as the Government contends, then, of course, the appellees have suffered injuries which are not compensable, for, while the Railroad Company owns its lands to ordinary low-water mark, its ownership between that mark and ordinary high-water mark is subordinate to the public right of navigation and subject to the power of the United States to use the river bed for purposes of navigation. Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., 99 F. 2d 902, 910, 911, 912.

The general rule is that private ownership of property on the banks and in the beds of navigable streams is subject to the public right of navigation and the governmental control and regulation necessary to make that right fully effective. But the public right of navigation to which such lands are subject (without payment of compensation) is limited to the natural state of the stream. This was the ruling in United States v. Cress, 243 U. S. 316, which involved the flowing of riparian lands by locks and dams constructed in the Cumberland and Kentucky Rivers in aid of navigation. The Court said (pages 325–327):

"It follows from what we have said that the servitude of privately owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as in their ordinary and natural condition are navigable in fact, and confined to the natural condition of the stream. And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the Government in the Cumberland and Kentucky Rivers, respectively, are for raising the level of those streams along certain stretches by means of back water, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the Government has 'canalized' the rivers. * * *

"But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment. Monongahela Navigation Co. v. United States, 148 U. S. 312, 336; United States v. Lynah, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be over-

flowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

See, also, United States v. Chicago, B. & Q. R. Co., 8 Cir., 82 F. 2d 131, 134; Jacobs v. United States, 5 Cir., 45 F. 2d 34, 37; United States v. Jacobs, 290 U. S. 13.

The opinion in the Cress case does not disclose that any of the lands there involved were below high-water mark, but it refers to "privately-owned lands forming the banks and bed of a stream", which is the exact situation in the case at bar. The opinion in the Cress case refers to United States v. Lynah, 188 C. S. 445, saying (p. 325 of 243 U. S.):

"In United States v. Lynah, 188 U. S. 445, the same principle was applied in the case of an operation by the Government of the United States. For the improvement of the navigation of the Savannah River certain dams and other obstructions were placed and maintained in its bed, with the result of raising the water above its natural height and backing it up against plaintiffs' embankment upon the river and interfering with the drainage of their plantation. This was held (pp. 465, 471) to be a taking of private property, requiring compensation under the Fifth Amendment, notwithstanding the work was done by the Government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property thereby flowed."

The opinion in the Lynah case shows that the land flowed by the Government dam was a rice plantation, a large portion of which lay between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and by means of floodgates therein the land was flooded and drained at the will of the owner. The result of the increased levels caused by the dam was to destroy the usefulness of the embankment, to raise the water on the plantation about 18 inches, and to convert a valuable rice plantation into a bog. This was held to be a taking.

The Lynah and Cress cases appear to be decisive of this case. The Government appreciates that the Lynah case is opposed to its contentions. In its brief it says:

"United States v. Lynah, 188 U. S. 445 (1903) and cases following it (Williams v. United States, 104 Fed. 50 [C. C. S. C. 1900], aff'd, 188 U. S. 485 [1903]; King v. United States, 59 Fed. 9 [C. C. S. C. 1893]; Lowndes v. United States, 105 Fed. 838 [C. C. S. C. 1901]; and Heyward v. United States, 46 C. Cls. 484 [1911], 52 C. Cls. 87 [1917] aff'd per cur. by an evenly divided court, 250 U. S. 633 [1919]) are overruled or limited to their precise facts by Willink v. United States, supra [240 U. S. 572]

(1916). See Greenleaf [Johnson] Lumber Co. v. Garrison, supra [237 U. S. 251] (1915), at 263.

"Cf. Philadelphia Co. v. Stimson, 223 U. S. 605 (1912)."

It is interesting to note that in the Cress case, at pages 320–321 of 243 U. S., the Supreme Court cites Greenleaf Johnson Lumber Co. v. Garrison, supra; Philadelphia Co. v. Stimson, supra, and Willink v. United States, supra, in support of the general rule "that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right"; and then points out that "it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

The Willink case, 240 U. S. 572, was decided before the Cress case. An analysis of the Willink case discloses no conflict with either the Cress case or the Lynah case. The Willink case did not involve damages to property caused by artificial water levels. Willink had a wharf and a marine railway, used for repairing vessels. These structures extended into the waters of the harbor of the Savannah River at Savannah, Georgia. Willink's structures were in part below the mean high-water line. The lower end of his railway was under water at high tide. He maintained piling on both sides of the railway to prevent its becoming obstructed by mud. Prior to May 4, 1889, Willink's property was outside of the harbor line. On that date the Secretary of War, under the authority of an Act of Congress, reestablished the harbor line so as to bring Willink's structures within it. In 1892, Willink undertook to renew his piling and wharf. He was requested by a Government Engineer to desist, and was threatened with prosecution if he did not desist. Thereafter he operated his facilities as best he could, but, because of the fact that his piling and wharf were not renewed, he was able to repair only smaller vessels and was obliged to dredge. This condition continued until 1897, when the harbor line as it had existed prior to May 4, 1889, was restored. Willink contended that he was entitled to be compensated for the expense of dredging and for

what he had lost from his inability to repair large vessels. The Supreme Court ruled that there was not a taking, since the possession of his upland had not been disturbed, and that the request that he desist from renewing his structures had deprived him of no rights; that, the river being navigable and tidal, whatever rights he had in the land below the mean high-water line were subordinate to the public right of navigation and the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed; that, if navigation was likely to be injuriously affected by the presence of structures below the mean high-water line, Congress could prevent their renewal without payment of compensation; that Congress had authorized the Secretary of War to establish the harbor lines and had made it unlawful to extend any wharf or other works within the harbor area, except under regulations of the Secretary; that Willink's piling and wharf were below the mean high-water line and within the harbor area, and, since he was proceeding to renew his piling in violation of the statute, the engineer officer properly requested him to desist.

In principle, the Willink case follows United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53. There was involved in that case the right of a riparian owner to compensation for the loss of structures erected under a revocable license from the Secretary of War, in the bed of the St. Marys River. Congress, by an Act of 1909, had determined, in effect, that these structures were obstructions to navigation, and that the entire bed and flow of the river was necessary for the purposes of navigation. The Court pointed out that, under the laws of Michigan, the riparian owner had title to the river bed opposite its [the riparian owner's] upland out to the middle thread of the stream, but that its title was subject to the power of Congress over the improvement of navigable rivers for purposes of navigation, and that the judgment of Congress as to whether or not a construction in or over such a river is or is not an obstacle to navigation is conclusive. The Court ruled that, since Congress had determined that the structures of the riparian owner in the river bed were obstacles to navigation, the loss of them did not entitle the owner to compensation. It is to be noted, also, that in that case no question of damages resulting from the creation of artificial levels in the river was involved. See, also, Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251.

Since the embankment and structures of the appellees are not claimed to be, and are not, obstructions to navigation, and have not been determined by Congress to be such obstructions, we think

that, under the rule announced in the Lynah and Cress cases, the flooding of the appellees' property, here involved, above ordinary high-water mark was a taking of their property, for which they were entitled to compensation.[1]

Our conclusion is that the court below ruled correctly in excluding evidence to show that portions of the railroad embankment rested upon lands lying between the high-water mark and the low-water mark of the river. It is unnecessary to consider other questions.

The judgments appealed from are affirmed.

Judgment

United States Circuit Court of Appeals, Eighth Circuit

May Term, 1940
Tuesday, July 30, 1940

No. 11300

UNITED STATES OF AMERICA, APPELLANT

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, AND THE WESTERN UNION TELEGRAPH AND CABLE COMPANY

Appeal from the District Court of the United States for the District of Minnesota

No. 11301

UNITED STATES OF AMERICA, APPELLANT

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, AND HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, AND WESTERN UNION TELEGRAPH AND CABLE COMPANY

---

[1] See and compare the following cases dealing with the right to recover compensation for lands affected by flowage from dams:
Pumpelly v. *Green Bay & Miss. Canal Co.*, 13 Wall. (80 U. S.) 166; *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S. 254; *Manigault* v. *Springs*, 199 U. S. 473; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180; *Hurley* v. *Kincaid*, 285 U. S. 95; *Jacobs* v. *United States* 290 U. S. 13; *United States* v. *Chicago, B. & Q. R. Co.*, 8 Cir., 82 F. 2d 131; *United States* v. *Chicago, B. & Q. R. Co.*, 7 Cir., 90 F. 2d 161; *United States* v. *Wabasha-Nelson Bridge Co.*, 7 Cir., 83 F. 2d 852; *Karlson* v. *United States*, 8 Cir., 82 F. 2d 330; *United States* v. *Wheeler Township*, 8 Cir., 66 F. 2d 977.

Appeal from the District Court of the United States for the District of Minnesota

These causes came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and were argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court, in these causes, be, and the same are hereby, affirmed without costs to either party in this Court.

JULY 30, 1940.

Notice and motion of appellant for stay of mandate

Nos. 11300 and 11301

AFFIDAVIT

STATE OF MASSACHUSETTS,
County of Hampden.

Margaret Tierney, being first duly sworn on oath, says that she is a clerk in the office of the Department of Justice in Springfield, Massachusetts, where John J. Courtney, Special Assistant to the Attorney General is stationed at the time of the making of this affidavit. That she served a copy of the annexed notice of motion upon Messrs. A. C. Erdall, F. W. Root, C. O. Newcomb, A. N. Whitlock, and C. S. Jefferson, personally, by depositing a true and correct copy thereof in a franked envelope of the Department of Justice, in the United States mails at the Post Office in Springfield, Massachusetts, on August 23, 1940, said envelope being addressed to the aforesaid attorneys at 25 Milwaukee Station, Minneapolis, Minnesota, the place of business of said counsel.

MARGARET TIERNEY.

AUGUST 23, 1940.

Subscribed and sworn to before me this 23rd day of August, 1940.

[SEAL] D. JOSEPH GREELEY,
Notary Public.

My Commission Expires Dec. 4, 1942.

Notice of motion

To Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al., Appellees in the above entitled causes, and to Messrs. A. C. Erdall, F. W. Root, C. O. Newcomb, A. N. Whitlock, and C. S. Jefferson, Attorneys for Appellees.

You will please take notice that on August 27, 1940, the Appellant in the above-entitled causes will present the annexed motion

to the Court, before a Judge thereof, at St. Paul, Minnesota, at 10 o'clock in the forenoon of said day or as soon thereafter as said counsel shall be heard.

UNITED STATES OF AMERICA,
By JOHN J. COURTNEY,
Special Assistant to the Attorney General.

AUGUST 23, 1940.

Motion

Comes now the United States of America, and moves the Court for an order staying the mandates in each of the above-entitled causes (which were presented as one cause), and decision rendered thereon July 30, 1940, for a period of 30 days, or until the further order of the Court thereon.

Said motion is based upon the affidavit of counsel hereto annexed, and upon all the files, records, and proceedings in these causes.

UNITED STATES OF AMERICA,
By JOHN J. COURTNEY,
Special Assistant to the Attorney General.

AUGUST 23, 1940.

Affidavit

STATE OF MASSACHUSETTS,
County of Hampden.

John J. Courtney, being first duly sworn on oath, deposes and says that he is a Special Assistant to the Attorney General, and one of counsel for Appellants in the above-entitled causes, which said causes, and each of them, were consolidated on appeal, and presented as one cause, and a single decision rendered thereon, on July 30, 1940.

That your affiant states to the Court that the Solicitor General of the United States has, since the rendition of this decision, been considering the advisability of a petition for certiorari thereon to the Supreme Court of the United States.

That the effect of this decision upon the policy of the Government in dealing with navigable waters has a far-reaching consequence; and that the said decision renders the United States liable, for great sums of money; and that additional time is needed within which to determine upon the policy of the Government in connection therewith, and within which time to prepare and file an adequate and comprehensive petition for certiorari and present the same.

Further affiant saith not except that this affidavit is made in support of a motion to the Court, praying, under the rules, for a stay of the mandate to be issued in each of the several causes, and for such other relief in the premises as to the Court may seem just and proper.

JOHN J. COURTNEY.

Subscribed and sworn to before me this 23rd day of August, 1940.

[SEAL] D. JOSEPH GREELEY,
Notary Public.

My Commission Expires Dec. 4, 1942.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Aug. 27, 1940.

Order staying issuance of mandate

May Term, 1940.

Tuesday, August 27, 1940

On consideration of the motion of appellant for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

AUGUST 27, 1940.

Clerk's certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the

full captions, titles and endorsements omitted in pursuance
rules of the Supreme Court of the United States, in certain
in said Circuit Court of Appeals wherein the United Sta
America was Appellant, and The Chicago, Milwaukee, St.
and Pacific Railroad Company, et al., were Appellees, No.
and wherein the United States of America was Appellan
The Chicago, Milwaukee, St. Paul and Pacific Railroad Com
et al., were Appellees, No. 11301, as full, true and compl
the originals of the same remain on file and of record in my

In Testimony Whereof, I hereunto subscribe my nam
affix the seal of the United States Circuit Court of Appea
the Eighth Circuit, at office in the City of St. Louis, Mis
this 14th day of September, A. D. 1940.

[SEAL] E. E. KOCH,

Clerk of the United States Circuit Court
of Appeals for the Eighth Cir

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed December 9, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FILE COPY

BLANK PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Specification of error to be urged	6
Reasons for granting the writ	6
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Barr v. *Spalding*, 46 F. 2d 798	8
Bedford v. *United States*, 192 U. S. 217	12
Cubbins v. *Mississippi River Com.*, 241 U. S. 351	9
Gibson v. *United States*, 166 U. S. 269	7, 9
Gilman v. *Philadelphia*, 3 Wall. 713	6
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251	7, 11
Hawkins Point Light-House Case, 39 Fed. 77	7
Heyward v. *United States*, 46 C. Cls. 484, 52 C. Cls. 87	11
Hood v. *United States*, 49 C. Cls. 669	12, 13
Jackson v. *United States*, 230 U. S. 1	9
Jenkins v. *United States*, 60 C. Cls. 23, affirmed, 273 U. S. 649	8, 11
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82	6, 8
Manigault v. *Springs*, 199 U. S. 473	11
Marret v. *United States*, 82 C. Cls. 1, certiorari denied, 299 U. S. 545	8, 9
Mills v. *United States*, 46 Fed. 738	11
Morrill v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 2 N. W. 842	6
Philadelphia Co. v. *Stimson*, 223 U. S. 605	7, 11
Port of Seattle v. *Oregon & W. R. R.*, 255 U. S. 56	6
W. A. Ross Constr. Co. v. *Yearsley*, 103 F. 2d 589, affirmed on another point, 309 U. S. 18	8
Scranton v. *Wheeler*, 179 U. S. 141	6, 7, 8
South Carolina v. *Georgia*, 93 U. S. 4	7, 9
Stockton v. *Baltimore and N. Y. R. Co.*, 32 Fed. 9	7
Union Bridge Co. v. *United States*, 204 U. S. 364	9
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	6, 7, 8, 11
United States v. *Cress*, 243 U. S. 316	9
United States v. *Dern*, 289 U. S. 352	7

Cases—Continued. Page

United States v. *Heyward*, 250 U. S. 633 11
United States v. *Lynah*, 188 U. S. 445 ..... 10, 11
United States v. *Meyer*, 113 F. 2d 387 8
West Chicago Railroad v. *Chicago*, 201 U. S. 506 9
Whitaker v. *McBride*, 197 U. S. 510 6
Wilink v. *United States*, 240 U. S. 572 7

Statutes:

Act of March 3, 1899, c. 425, Sec. 9, 30 Stat. 1121, 1151 4
Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 927 2

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above causes on July 30, 1940, affirming the judgments of the United States District Court for the District of Minnesota.

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 188–198) is reported in 113 F. 2d 919. The district court did not write an opinion.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered on July 30, 1940 (R. 198–199). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it raises the water in a navigable stream above the ordinary high-water mark for the improvement of navigation, is required to pay compensation for damages thereby caused to structures in the bed of the river.

STATEMENT

During the past thirty years Congress has appropriated large sums of money for the construction of a series of locks and dams in the upper Mississippi River. These dams, now 26 in number, raise the level of the river by creating slack water pools which are so spaced as to provide a nine-foot channel from Minneapolis to the mouth of the Missouri River. Lock and Dam No. 5, near Minneiska, Minnesota, was authorized by the Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 927, and is an integral part of the Government's program for improving the navigability of the upper Mississippi River. This dam raises the level of the river some six or eight feet above ordinary high-water mark (R. 133), creating a lake or pool which extends upstream for a distance of more than seven

miles and inundates the bottom lands along the west bank of the river in Wabasha and Winona counties, Minnesota (R. 156, 179).

The tracks of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the telegraph lines of the Western Union Telegraph and Cable Company are located on an embankment which follows the west bank of the Mississippi River across these bottom lands in Wabasha and Winona counties. Accordingly, the Government in 1933, before the dam was completed, instituted the present condemnation proceedings to acquire the right to back water across the companies' right-of-way and up against their embankment to an elevation of 660 feet above mean sea level (R. 1–7, 8–14, 15, 16). The court on August 4, 1934, entered an order granting the United States immediate possession (R. 23–24, 25–26). The Government then proceeded to remove the timber and underbrush in the margins of the river and in the area to be flooded, so as to prevent any subsequent clogging of the locks and spillways (R. 98, 107). The railroad embankment was thereby exposed to greater wind, wave, and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment (R. 116).

When the question of valuation was submitted to a jury in 1935, the Government offered to prove that the railroad company, in realigning and doubletracking its roadbed in 1910, had eliminated

a number of curves by placing portions of their embankment across the bends in the Mississippi River with the result that four segments of the present embankment (for a total distance of 5,300 feet) encroach upon the bed of the river.[1] This proof was offered on the theory that private rights in the beds of navigable streams are subordinate to the navigation servitude held by the Federal Government and that the defendants were therefore not entitled to compensation for the partial flooding of those four segments of their right-of-way and embankment which are located in the bed of the stream between high- and low-water mark (R. 127–129, 130–139, 140–147).[2] Diagrams illustrative of the physical facts involved in the Government's offer of proof are printed as an appendix, *infra*, p. 14.

The defendants objected to this evidence as immaterial (R. 130). They argued that structures located in the bed of the stream had to be compensated for in those cases where the damages complained of were caused by raising the level of the

[1] Before realigning their roadbed in 1910, the railroad company obtained the local Army Engineer's consent (R. 147–151), but the company did not submit its plans to the Chief of Engineers and the Secretary of War, as required by the Act of March 3, 1899, c. 425, sec. 9, 30 Stat. 1151.

[2] Appellees have conceded that one segment (1,200 feet) of the embankment rests on lands which are a part of the bed of the Mississippi River (R. 123). Whether the other three segments are within the bed of the river is a jury question (R. 191).

river over and above the ordinary high-water mark, and where the structures themselves were not a menace to navigation. The trial judge adopted this theory and rejected the Government's offer of proof (R. 147). The United States then moved to dismiss from the proceedings the four areas specified in its offer of proof, but this motion was also denied (R. 152–155).[3] A general verdict assessing the entire damages to the encroachment and non-encroachment portions of the embankment at $177,594.63 (R. 41) was approved by the court (R. 45–49).

The parties subsequently stipulated that the judgment should be subdivided, that $67,604.88 should be deemed the fair and reasonable cost of adjusting the structures in the four encroachment areas, and that the issues on appeal should be limited to the denial of the foregoing offer of proof and motion to dismiss (R. 118–125, 80–83, 84–87).

In an opinion rendered by the circuit court of appeals on July 30, 1940, the rulings of the district court on the questions thus reserved were affirmed. The appellate court held that the flooding of appellees' property above ordinary high water mark was a compensable taking even though the damaged structures were located in the bed of the stream (R. 138–198).

[3] In the condemnation petitions the Government expressly declared that the inclusion of property below high-water mark was not to be deemed an admission that defendant's title was superior to the public servitude (R. 4, 11).

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the United States, when it raises the water in a navigable stream above the ordinary high water mark for the improvement of navigation, is required to pay compensation for damages thereby caused to structures in the bed of the river.

REASONS FOR GRANTING THE WRIT

1. The navigable rivers of the United States are "the public property of the nation," and any private rights in these streams are subservient to the dominant power of Congress to improve navigation. *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–725; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, 70; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, 87–88; *Scranton* v. *Wheeler,* 179 U. S. 141, 163. Although under local law the fee title to the bed of the stream may be vested in the riparian proprietor,[4] such title "is always subject to the servitude in respect to navigation created in favor of the Federal government by the Constitution."

[4] Each state decides for itself whether a riparian proprietor's title to lands along a navigable river stops at the high-water mark, extends to low-water mark, or continues to the thread of the stream. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 64; *Whitaker* v. *McBride*, 197 U. S. 510, 511–512. In Minnesota private titles extend to low-water mark, with title to the rest of the bed in the state. *Morrill* v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 226, 228, 2 N. W. 842 (1879).

Gibson v. *United States,* 166 U. S. 269, 272; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 635; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 259; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62–63.

When the United States, in order to improve navigation, appropriates a portion of the bed of a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the private proprietor is completely ousted. But such a "taking" is not compensable under the Fifth Amendment, because the United States is merely exercising a servitude to which the land was already subject.[5] It is clear from the decisions that the entire bed of the stream, including lands between ordinary high- and low-water mark, is subject to the Federal Government's navigation servitude. *Willink* v. *United States,* 240 U. S. 572, 580; *United States* v. *Dern,* 289 U. S. 352, 354. "When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water." *Greenleaf Lumber Co.* v. *Garrison,*

[5] *Scranton* v. *Wheeler* 179 U. S. 141, 163; *South Carolina* v. *Georgia,* 93 U. S. 4, 11, 12; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, 72; see also *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 Fed. 9 (C. C. D. N. J. 1887), referred to with approval in *Scranton* v. *Wheeler, supra,* pp. 159–161; *Hawkins Point Light-House Case,* 39 Fed. 77, 83 (C. C. D. Md. 1889), referred to with approval in *United States* v. *Chandler-Dunbar Co., supra.*

237 U. S. 251, 263; *Scranton* v. *Wheeler*, 179 U. S. 141, 143, 144.[6]

It therefore follows that persons who place piers, wharves, docks, and other structures "in the shallow water of the shore" on land subject to a navigation servitude do so with the realization that "every such structure in the water of a navigable river is subordinate to the right of navigation, *and subject to the obligation to suffer the consequences of the improvement of navigation*" (italics supplied). *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70. And this is true even though the use which they make of the river bed does not in and of itself impede navigation. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–87.

The servitude continues even though "the natural condition of the stream" has been artificially changed. For example, in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, the United States dredged a channel across shallow waters where none had previously existed, thus destroying valuable oyster beds. But since the private owner's rights in these shallow waters were subject (p. 88) "to the power of Congress to deepen the

[6] See also *Marret* v. *United States*, 82 C. Cls. 1, 13 (1936), certiorari denied, 299 U. S. 545; *United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7, 1940); *Barr* v. *Spalding*, 46 F. 2d 798, 800 (W. D. Ky. 1928); *W. A. Ross Constr. Co.* v. *Yearsley*, 103 F. 2d 589, 593 (C. C. A. 8, 1939), affirmed on another point, 309 U. S. 18; *Jenkins* v. *United States*, 60 C. Cls. 23, 28–29 (1925), affirmed, 273 U. S. 649.

water over such lands", he had to "suffer the consequences" of the dumping operations which also destroyed oyster beds on each side of the dredged channel. In *West Chicago Railroad* v. *Chicago,* 201 U. S. 506, a tunnel which had been previously constructed under the Chicago River was ordered removed so that the channel could be dredged to a depth of 21 feet. This Court held that the owners were not entitled to compensation. In *Union Bridge Co.* v. *United States,* 204 U. S. 364, 373, 388–389, 399–400, the Government, after placing a dam across the Ohio River and raising "the water in the Allegheny and Monongahela at their junction six feet above their normal depths", ordered the bridge which spanned the Allegheny River at that point to be altered or removed so that it would not impede navigation on this artificially raised waterway. Here again the injury was not compensable.[7]

United States v. *Cress,* 243 U. S. 316, relied on by the court below, is not in point because it involved land impressed with no navigation servitude, namely, land in the bed of a *nonnavigable* tributary and land above high-water mark. Cf. *Marret* v. *United States,* 82 C. Cls. 1, 14 (1936), certiorari denied, 299 U. S. 545. If any dicta in that case be construed as indicating that the Gov-

[7] See *South Carolina* v. *Georgia,* 93 U. S. 4; *Cubbins* v. *Mississippi River Com.,* 241 U. S. 351, 369; *Jackson* v. *United States,* 230 U. S. 1; *Gibson* v. *United States,* 166 U. S. 269.

ernment's servitude in a *navigable* river is "confined to the natural condition of the stream," it is overborne by the actual decisions, discussed above, permitting the Federal Government to make artificial improvements without incurring any liability for damages caused to structures or property located on, under, and over the bed of the stream.

United States v. *Lynah*, 188 U. S. 445, also relied on by the court below, is of doubtful authority on this point and should be reexamined. In that case a riparian proprietor, by means of an embankment along the Savannah River, had reclaimed lands between high- and low-water mark which he used for the growing of rice. The Government later constructed a dam which kept the river a foot or two above its former level at low tide. This made it impossible to drain the rice lands which in time became permanently flooded. By a five to three decision, this Court held that there had been a compensable "taking." If the case be construed as denying the existence of a servitude in that portion of the stream between high- and low-water mark,[8] it has been impliedly overruled by the later

[8] The majority opinion written by Mr. Justice Brewer seems to have viewed the Government's navigation servitude as nothing more than the power to utilize the bed of the stream by paying compensation therefor, a mere power of eminent domain (pp. 464–465, 471). Such a narrow construction of the Government's paramount rights in the beds of navigable streams has been repudiated by later decisions permitting the Government to appropriate such lands for

decisions already discussed. The doubtful authority of the *Lynah* case is emphasized by the fact that a subsequent case involving an adjacent rice plantation on the Savannah River, presenting identical facts, was affirmed only by an evenly divided court. *United States* v. *Heyward,* 250 U. S. 633.[9]

Even if the *Lynah* decision is still good law, it is clearly distinguishable from the present case on the same grounds adopted by Mr. Justice Brewer in distinguishing it from *Mills* v. *United States,* 46 Fed. 738 (S. D. Ga. 1891). The railroad embankment here in question is not completely submerged. It is still being used and will continue to be used by the fast trains between Chicago and the Twin Cities (R. 99, 107). The defendants, like Mills, were merely put to some expense in order that they might be able to continue using the bed of the stream. Such injuries are consequential in character and do not constitute a taking within the meaning of the Fifth Amendment. *United States* v. *Lynah,* 188 U. S. 445, 473–474; *Manigault* v.

navigation purposes without the payment of compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Jenkins* v. *United States*, 60 C. Cls. 23, 28–29 (1925), affirmed, 273 U. S. 649; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

[9] That case had been twice argued in the Court of Claims and a different Chief Justice on each occasion had expressed his doubts about the correctness of the *Lynah* decision. *Heyward* v. *United States*, 46 C. Cls. 484, 501 (1911), 52 C. Cls. 87, 89 (1917).

Springs, 199 U. S. 473, 484–485; *Bedford* v. *United States,* 192 U. S. 217, 224.

2. *Hood* v. *United States,* 49 C. Cls. 669, 678–680 (1914),[10] is in direct conflict with the decision below. There the claimant had constructed a mill over the Monongahela River. The United States, in improving navigation, raised the river's surface above ordinary high-water level, thereby flooding the lower part of the mill as well as some land above the high-water mark. The Court of Claims allowed recovery for the submergence of the uplands along the river bank but not for the flooding of the mill building located within the river bed. It will be noted that the building in the *Hood* case, like the embankment in the instant case, was not an obstruction to navigation—at least it had not been ordered removed. Yet the owner was not entitled to any compensation for the flooding of the structure to a point well above the natural high-water mark.

3. The instant question is one which will constantly recur as the Government continues to construct large dams in aid of navigation. For example, the establishment of other slack-water pools in the Upper Mississippi River has already given rise to similar questions in connection with Pools 3, 5A, 6, 8, 9, 11, 12, 13, 14, and 22. In each of

[10] An examination of the records of the Court of Claims discloses that upon a new trial subsequently granted in this case the same opinion as that appearing at 49 C. Cls. was adopted.

these cases the question arises whether the Government is liable for damages caused to those segments of the railroad embankments which are located in the bed of the river below high-water mark. Three railroads have presented claims, other than those here involved, in excess of $165,000, exclusive of interest. There are similar encroachments in the beds of other navigable rivers in which dams have been authorized or are contemplated, for which compensation will be denied or awarded according as the decision in the *Hood* case or the decision below is to be followed.

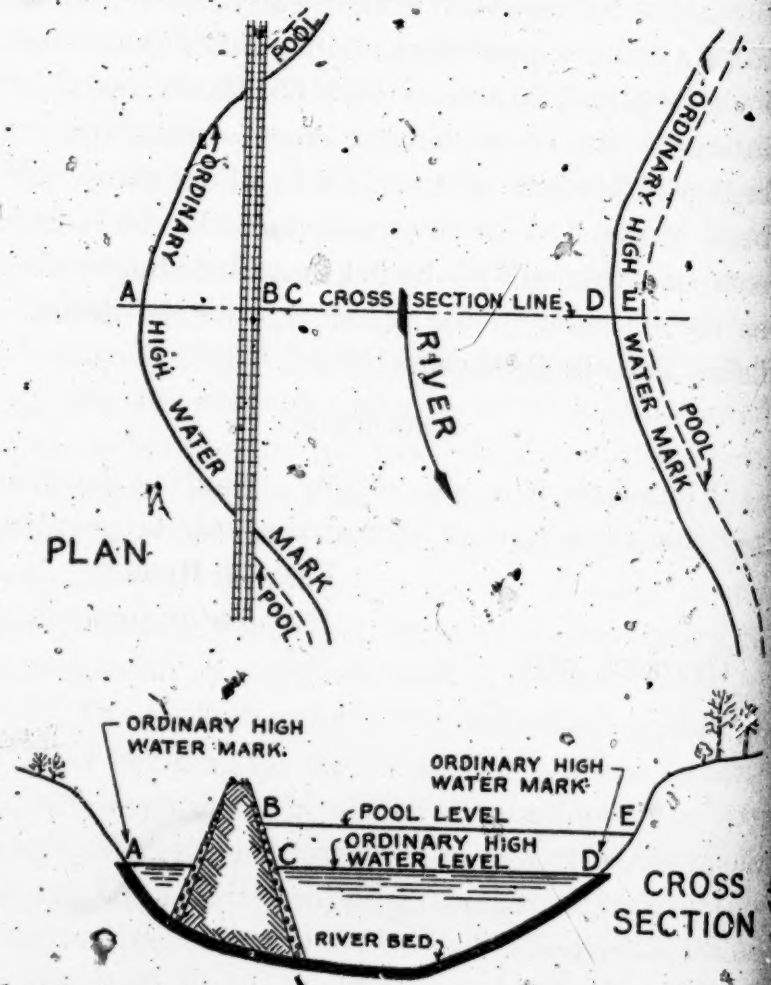
CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER, 1940.

APPENDIX



The above plan and cross-section are sketches of a typical "encroachment area." The Government concedes its liability to pay compensation for flowage of property situated outside of the river bed, as for example between D and E. But it denies liability to pay compensation for the flowage of property within the river bed caused by raising the water surface vertically above ordinary high water level, as from C to B.

U. S. GOVERNMENT PRINTING OFFICE: 1949

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U.S.
FILED
JAN 24 1941
CHARLES ELMORE CROPLEY
CLERK

No. 585

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

BLANK PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	7
Summary of argument	7
Argument:	
1. Private rights in the beds of navigable rivers are subject to the navigation servitude created in favor of the Federal Government by the Constitution	10
2. The Federal Government's navigation servitude extends to all lands below the high-water mark of a navigable river	13
3. Structures placed on, over, or under lands impressed with a navigation servitude must "suffer the consequences of the improvement of navigation"	14
4. Even a licensed structure in the bed of a navigable river must "suffer the consequences" of subsequent improvements	22
Conclusion	24
Appendix A	25
Appendix B	27

CITATIONS

Cases:	
Barr v. *Spalding*, 46 F. 2d 798	13
Bedford v. *United States*, 192 U. S. 217	22
Brown v. *United States*, 81 Fed. 55	14
Chicago, B. & Q. Railway v. *Drainage Comm'rs*, 200 U. S. 561	21
Cubbins v. *Mississippi River Com.*, 241 U. S. 351	16
Delaware R. Co. v. *Weeks*, 293 Fed. 114	14
Gibson v. *United States*, 166 U. S. 269	7, 11, 16
Gilman v. *Philadelphia*, 3 Wall. 713	7, 10
Great Northern Ry. Co. v. *Washington Elec. Co.*, 197 Wash. 627, 86 P. 2d 208	17
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251	7, 9, 11, 13, 19, 20, 22, 23
Hawkins Point Light-House Case, 39 Fed. 77	12
Heyward v. *United States*, 46 C. Cls. 484, 52 C. Cls. 87	20
Hood v. *United States*, 49 C. Cls. 669	8, 16, 17
Jackson v. *United States*, 230 U. S. 1	16

Cases—Continued. Page

Jenkins v. *United States*, 60 C. Cls. 23, affirmed 273 U. S. 649 ..... 13, 19
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82 .. 8, 10, 14, 15
Louisville Bridge Co. v. *United States*, 242 U. S. 409 23
Manigault v. *Springs*, 199 U. S. 473 ..... 21, 22
Marret v. *United States*, 82 C. Cls. 1, certiorari denied, 299 U. S. 545 ..... 13, 18, 20
Mills v. *United States*, 46 Fed. 738 ..... 20, 21
Morrill v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 2 N. W. 842 11
New Jersey v. *Sargent*, 269 U. S. 328 11
Philadelphia Co. v. *Stimson*, 223 U. S. 605 ..... 11, 19, 23
Port of Seattle v. *Oregon & W. R. R.*, 255 U. S. 56 11
Richardson v. *United States*, 100 Fed. 714 14
Scranton v. *Wheeler*, 57 Fed. 803 12
Scranton v. *Wheeler*, 179 U. S. 141 ..... 8, 10, 11, 12, 13
South Carolina v. *Georgia*, 93 U. S. 4 ..... 12, 16
Stockton v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 12
Union Bridge Co. v. *United States*, 204 U. S. 364 ..... 9, 16, 23
United States v. *Appalachian Electric Power Co.*, No. 12, October Term, 1940 ..... 10, 12, 18, 22
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 .... 8, 10, 11, 12, 14, 15, 19
United States v. *Cress*, 243 U. S. 316 ..... 8, 17, 18
United States v. *Dern*, 289 U. S. 352 13
United States v. *Heyward*, 250 U. S. 633 20
United States v. *Lynah*, 188 U. S. 445 .. 8, 14, 17, 18, 19, 20, 21, 22
United States v. *Meyer*, 113 F. 2d 387, certiorari denied November 25, 1940 ..... 13, 20
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690 .. 22
W. A. Ross Const. Co. v. *Yearsley*, 103 F. 2d 589, affirmed on another point 309 U. S. 18 ..... 13, 14
West Chicago Railroad v. *Chicago*, 201 U. S. 506 16
Whitaker v. *McBride*, 197 U. S. 510 ..... 10, 11
Willink v. *United States*, 240 U. S. 572 ..... 7, 8, 13, 20, 22

Constitution and statutes:

Rivers and Harbors Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151, 33 U. S. C. sec. 401 ..... 2, 4, 9, 22, 23
Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918 .. 2
Judicial Code, sec. 240 (a), as amended by the Act of February 13, 1925 2
U. S. Const. Amendment V 8, 12, 22

Miscellaneous:

16 Op. A. G. 479 (1880) 14
16 Op. A. G. 534 (1880) 13
17 Op. A. G. 109 (1881) 10, 13
18 Op. A. G. 64 (1884) 14

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 188–198) is reported in 113 F. 2d 919. The district court did not write an opinion.

JURISDICTION

The judgments of the circuit court of appeals were entered on July 30, 1940 (R. 198–199). The petition for a writ of certiorari was filed on October 29, 1940, and was granted on December 9, 1940.

The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it raises the water in a navigable stream above the ordinary high-water mark for the improvement of navigation, is required to compensate the riparian owner for the additional flooding of structures located in the bed of the river.

STATUTE INVOLVED

Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1151, 33 U. S. C. secs. 401, 403, are printed as Appendix A.

STATEMENT

During the past thirty years Congress has appropriated large sums of money for the construction of a series of locks and dams in the upper Mississippi River. These dams, now 26 in number, raise the level of the river by creating slackwater pools which are so spaced as to provide a nine-foot channel from Minneapolis to the mouth of the Missouri River (R. 112–113). Lock and Dam No. 5, near Minneiska, Minnesota, was authorized by the Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 927, and is an integral part of the Government's program for improving the navigability of the upper Mississippi River.

This dam raises the level of the river at Minneiska some six or eight feet above ordinary high-water mark (R. 132, 133, 140), creating a lake or pool which extends upstream for a distance of more than seven miles and inundates the bottom lands along the west bank of the river in Wabasha and Winona counties, Minnesota (R. 156, 179).

Inasmuch as the tracks of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the telegraph lines of the Western Union Telegraph and Cable Company are located on an embankment which follows the westerly bank of the Mississippi River across these bottom lands in Wabasha and Winona counties, it was necessary for the Government in 1933, before the dam was completed, to institute the present condemnation proceedings to acquire the right to back water across the companies' right-of-way and up against their embankment to an elevation of 660 feet above mean sea level (R. 1–7, 8–14, 15, 16). Orders granting condemnation and appointing commissioners to ascertain and report the compensation to be paid the respondents were entered on April 13, 1934 (R. 17–20, 20–23). Work on the dam having progressed more rapidly than the litigation, the court on August 4, 1934, entered orders granting the United States immediate possession (R. 23–24, 25–26). The Government then proceeded to remove the timber and underbrush in the margins of the river and in the area to be flooded,

so as to prevent any subsequent clogging of the locks and spillways (R. 98, 107). The railroad embankment was thereby exposed to greater wind, wave, and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment (R. 116).

When the question of valuation was submitted to a jury in 1935, the Government offered to prove that the railroad company, in realigning and doubletracking its roadbed in 1910,[1] had eliminated a number of curves by placing portions of their embankment across the bends in the Mississippi River with the result that four segments of the present embankment (for a total distance of 5,300 feet) encroach upon the bed of the river.[2] This proof was offered on the theory that private rights in the beds of navigable streams are subordinate to the navigation servitude held by the

[1] Before realigning its roadbed in 1910, the railroad company obtained the local army engineer's consent (R. 147–151), but the company did not submit its plans to the Chief of Engineers and the Secretary of War, as required by the Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151.

[2] Respondents have conceded that one segment (1,200 feet) of the embankment rests on lands which were in 1910, and are now, below the ordinary high-water mark of the Mississippi River (R. 123). Whether the other three segments are within the bed of the river is a jury question (R. 191).

It is to be noted that the Government's offer of proof, contrary to respondents' contention (Br. in Opp. 12–13, 31), did not relate solely to the shore line of 1910. The offer is in the present tense, namely, that four segments of the railroad embankment "*are* constructed on land which *is* located below ordinary high-water mark" (R. 146).

Federal Government and that the defendants were therefore not entitled to compensation for the additional flooding of those four segments of their right-of-way and embankment which are located, between high- and low-water mark, in the bed of the stream (R. 146; see R. 127–129, 130–139, 140–147). Diagrams illustrative of the physical facts involved in the Government's offer of proof are printed as Appendix B, *infra*, p. 27.[3]

The defendants objected to this evidence as immaterial (R. 130). They argued that structures located in the bed of the stream had to be compensated for in those cases where the damages complained of were caused by raising the level of the river over and above the ordinary high-water mark, and where the structures themselves were not an obstruction or menace to navigation. The trial judge adopted this theory and rejected the Government's offer of proof (R. 147). The United States then moved to dismiss from the proceedings the four areas specified in its offer of proof, but this motion was also denied (R. 152–155).[4] A subsequent verdict assessing the

[3] Respondent objects to the inaccuracy of this illustrative diagram (Br. in Opp. 4–5), but we do not offer it as proof of the facts. Whether or not respondent's diagrams (Br. in Opp. 35–38) are accurate cannot be determined until after trial on the issue of encroachment.

[4] In the condemnation petitions the Government expressly declared that the inclusion of property below high-water mark was not to be deemed an admission that defendant's title was superior to the public servitude (R. 4, 11).

entire damages to the encroachment and non-encroachment portions of the embankment at $177,594.68 (R. 41) was approved by the court (R. 45–49). Both sides took an appeal (R. 49–60, 87).

As a result of subsequent decisions in other cases, many issues raised by the appeals were settled, and the parties accordingly entered into a stipulation in 1938 limiting the issues on appeal to the denial of the Government's offer of proof and motion to dismiss. It was also agreed that the judgment should be subdivided, that $67,604.88 should be deemed the fair and reasonable cost of adjusting the structures in the four so-called "encroachment areas", and that the appeals from the rest of the judgment covering the admittedly non-encroachment areas should be dismissed (R. 118–125). The circuit court of appeals, pursuant to this stipulation, modified the lower court's judgment and dismissed the appeals and cross-appeals except as to the encroachment areas (R. 80–83, 84–87).

The questions thus reserved were thereafter briefed and argued, and the rulings of the district court on these questions were affirmed. The appellate court held that the additional flooding of respondents' property was a compensable taking even though the damaged structures were located in the bed of the stream (R. 188–198).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the United States, when it raises the water in a navigable stream above the ordinary high-water mark for the improvement of navigation, is required to compensate the riparian owner for the additional flooding of structures located in the bed of the river.

2. In not directing the district court to dismiss, from the condemnation proceedings, that segment of the railroad embankment which is admittedly within the bed of the Mississippi River (R. 123).

3. In not remanding the case to the district court with directions to determine whether the other three segments are located on land impressed with a navigation servitude.

SUMMARY OF ARGUMENT

The navigable rivers of the United States are "the public property of the nation." *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–725. Private rights in the beds of such streams are "always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States,* 166 U. S. 269, 272. This servitude extends to the whole expanse of the stream, including lands between ordinary high- and low-water mark. *Willink* v. *United States,* 240 U. S. 572, 580; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 263.

286852—41——2

When the Government, in the exercise of its commerce power, interferes with a riparian owner's use of land impressed with a navigation servitude, the "taking" or "injury" is not compensable under the Fifth Amendment. *Scranton* v. *Wheeler*, 179 U. S. 141, 163. Persons who place structures on land subject to a navigation servitude must "suffer the consequences of the improvement of navigation." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *Hood* v. *United States*, 49 C. Cls. 669, 678–680 (1914). And this is true even though the use which the riparian owner makes of the river bed does not in and of itself impede navigation. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–88.

United States v. *Cress*, 243 U. S. 316, and *United States* v. *Lynah*, 188 U. S. 445, require no contrary conclusion. The first case is not in point because it involved land impressed with no navigation servitude. The second case, insofar as it holds that lands between high- and low-water mark are not subject to a navigation servitude and that the "taking" of such lands for navigation purposes is compensable, is no longer good law. *Willink* v. *United States*, 240 U. S. 572, 580; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. Furthermore, even under the doctrine of the *Lynah* case, the injuries now complained of are consequential in character and do not constitute a "taking" compensable under the Fifth Amendment.

The fact that respondents, prior to the realignment of their roadbed in 1910, obtained the local army engineer's consent (R. 147–151), does not prevent the Government, under any principle of contract or estoppel, from making subsequent navigation improvements. In the first place, respondents did not submit their plans to the Chief of Engineers and the Secretary of War, as required by the Rivers and Harbors Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151. In the second place, even a properly licensed structure erected on land impressed with a navigation servitude, must "suffer the consequences" of subsequent navigation improvements. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 260; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400.

ARGUMENT

Respondents' embankments, it must be assumed here, are located in the bed, that is, below the ordinary high-water mark, of a navigable stream. Their property rights, therefore, are held subject to the overriding power of the United States to improve navigation. This servitude extends to navigation improvements which change the natural condition of the stream, else it would be meaningless. And it exists equally in the case of land and structures which in themselves offer no obstacle to navigation. Otherwise the federal navigation powers would be limited to the removal of obstructions, and the equally important power to

make general navigation improvements might often be defeated by the cost of paying compensation for property interests which by definition exist only in servitude to the navigation powers of the United States.

These principles, which are decisive of the case at bar, have been settled by numerous decisions of this Court. The following argument, therefore, is presented in summary fashion.

1. *Private rights in the beds of navigable rivers are subject to the navigation servitude created in favor of the Federal Government by the Constitution.*—The navigable rivers of the United States are "the public property of the nation," and any private rights in these streams are subservient to the dominant power of Congress to improve navigation. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724–725; *United States* v. *Appalachian Electric Power Co.*, No. 12, October Term 1940, p. 6; 17 Op. A. G. 109, 110 (1881); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 70; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 87–88; *Scranton* v. *Wheeler*, 179 U. S. 141, 163.

Although under local law the technical title to the bed of the stream may be vested in the riparian proprietor,[5] such title "is always subject to the

[5] Each state decides for itself whether a riparian proprietor's title to lands along a navigable river stops at the high-water mark, extends to the low-water mark, or continues to the thread of the stream. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60; *Whitaker* v. *McBride*, 197 U. S. 510,

servitude in respect to navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States*, 166 U. S. 269, 272; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 635; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 259; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62–63. And this is true whether the title be in the state or the riparian proprietor. *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *New Jersey* v. *Sargent*, 269 U. S. 328, 337. Hence, respondents' argument (Br. in Opp. 14–16) that the Minnesota law accords them certain rights in the beds of navigable rivers is irrelevant. It may be conceded that respondents are riparian owners (R. 145), and that they have "as complete a right to the use of the riparian lands, the water, and river bed as can be obtained under state law," but the conclusion is still inescapable that the state and the respondents, alike, "hold the waters and lands under them subject to the power of Congress to control the waters for the purpose of commerce."

511–512. In some states, e. g., Washington, a riparian proprietor has no rights below the high-water mark, the state having reserved to itself title to the beds of all navigable streams. *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 64. In other states, e. g., Nebraska, the riparian proprietor holds to the thread of the stream, the state having retained no title whatever. *Whitaker* v. *McBride*, 197 U. S. 510, 511. In still other states, e. g., Minnesota, private titles extend to the low-water mark, with title to the rest of the bed in the state. *Morrill* v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 226, 228, 2 N. W. 842 (1879).

United States v. *Appalachian Electric Power Co.*, No. 12, October Term 1940, p. 20. The technical title may be helpful in protecting respondents against acts of the state or third parties, but it is of no avail against the exercise by the Federal Government of its navigation servitude. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62.

The subordination of private rights in the beds of navigable streams to the Government's navigation powers is made abundantly clear by the decisions of this Court. For example, when the United States, in order to improve navigation, appropriates a portion of the bed of a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the private owner is completely ousted. But such a "taking" is not compensable under the Fifth Amendment, because the United States is merely exercising a servitude to which the land was already subject. *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *South Carolina* v. *Georgia*, 93 U. S. 4, 11, 12; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 72; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J.), referred to with approval in *Scranton* v. *Wheeler, supra*, pp. 159–161; *Hawkins Point Light-House Case*, 39 Fed. 77, 83 (C. C. Md.), referred to with approval in *United States* v. *Chandler-Dunbar Co., supra; Scranton* v. *Wheeler*, 57 Fed. 803, 815 (C. C. A. 6), reversed upon joint motion of the parties, 163 U. S. 703, but quoted at length in 179 U. S. 141, 144–146.

2. *The Federal Government's navigation servitude extends to all lands below the high-water mark of a navigable river.*—The entire bed of the stream, including lands between ordinary high- and low-water mark, is subject to the Federal Government's navigation servitude. *Willink* v. *United States,* 240 U. S. 572, 580; *United States* v. *Dern,* 289 U. S. 352, 354; *Marret* v. *United States,* 82 C. Cls. 1, 13 (1936), certiorari denied, 299 U. S. 545; 16 Op. A. G. 534 (1880); 17 Op. A. G. 109 (1881). "Whatever rights the owner possesses below ordinary highwater mark are subordinate to the rights of the public." *United States* v. *Meyer,* 113 F. 2d 387, 398 (C. C. A. 7), certiorari denied, November 25, 1940. The navigation servitude of the Federal Government "extends, not only to that portion of the soil continuously submerged by the stream in its natural state, but also to that portion of the soil above low-water mark, and below the ordinary and usual high-water mark." *Barr* v. *Spalding,* 46 F. 2d 798, 800 (W. D. Ky.). "When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent on the depth or shallowness of the water." *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 263; *Scranton* v. *Wheeler,* 179 U. S. 141, 143, 144; *W. A. Ross Const. Co.* v. *Yearsley,* 103 F. 2d 589, 593 (C. C. A. 8), affirmed on another point, 309 U. S. 18; *Jenkins* v. *United States,* 60 C. Cls. 23, 28–29 (1925),

affirmed 273 U. S. 649; *Delaware R. Co.* v. *Weeks*, 293 Fed. 114, 120 (Del.); 16 Op. A. G. 479 (1880); 18 Op. A. G. 64 (1884).

3. *Structures placed on, over, or under lands impressed with a navigation servitude must "suffer the consequences of the improvement of navigation."*—It naturally follows from the foregoing principles that persons who place piers, wharves, docks, and other structures "in the shallow water of the shore" on land subject to a navigation servitude do so with the realization that "every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *W. A. Ross Const. Co.* v. *Yearsley*, 103 F. 2d 589, 592 (C. C. A. 9), affirmed on another point, 309 U. S. 18.

This is true even though the use which the riparian owner makes of the river bed does not in and of itself impede navigation. *Lewis Blue-Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–88. In that case this Court rejected the doctrine laid down in two lower court decisions[6] that so long as the owner of the bed of a navigable body of water "did not use it 'for the erection of structures impeding or obstructing navigation,' his ownership of the

[6] *Brown* v. *United States*, 81 Fed. 55 (C. C. E. D. Va.); *Richardson* v. *United States*, 100 Fed. 714 (C. C. E. D. Va.). The claimant also relied upon *United States* v. *Lynah*, 188 U. S. 445, 471, but to no avail (p. 83).

bottom and his right to put it to such use as did not obstruct navigation, was a property right, which could not be destroyed or taken without compensation."[7] Such a doctrine, this Court said (p. 87), fails to "recognize the qualified nature of the title which a private owner may have in lands underlying navigable waters."

Since a person who places structures in the bed of a navigable river must "suffer the consequences of the improvement of navigation," he cannot justly complain if the Government elects to change the natural depth or flow of the river. To say that a servitude exists for the "improvement of navigation," and then to say that the servitude ceases to exist the moment improvements are undertaken would be absurd. That the servitude continues even though the "natural condition" of the stream has been artificially changed is illustrated by a number of cases decided by this Court:

For example, in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, the United States dredged a channel across shallow waters where no channel had previously existed, thus destroying valuable oyster beds belonging to the claimant. The latter contended (p. 84) that, inasmuch as the Government had thus made "a place for vessels of deep draft where nature made a place for skiffs," he was entitled to compensation for the damages resulting from these artificial improvements. But

[7] A similar contention was rejected in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 61, 70.

since the private owner's rights in these shallow water were subject (p. 88) "to the power of Congress to deepen the water over such lands," he had to "suffer the consequences" not only of the dredging operations but also (p. 85) of the dumping operations which destroyed oyster beds on each side of the dredged channel. In *West Chicago Railroad* v. *Chicago*, 201 U. S. 506, a railway tunnel which had been previously constructed under the Chicago River was ordered removed so that the channel could be dredged to a depth of 21 feet. This Court held that the railroad was not entitled to compensation. In *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400, the Government, after placing a dam across the Ohio River and raising "the water in the Allegheny and Monongahela at their junction six feet above their normal depths," ordered the bridge which spanned the Allegheny River at that point to be altered or removed so that it would not impede navigation on this artificially raised waterway. Here again the injury was not compensable.[8]

This same doctrine has been recognized in the decisions of other courts. For example, in *Hood* v. *United States*, 49 C. Cls. 669, 678–680 (1914)[9],

[8] See also *South Carolina* v. *Georgia*, 93 U. S. 4; *Cubbins* v. *Mississippi River Comm'n.*, 241 U. S. 351, 369; *Jackson* v. *United States*, 230 U. S. 1; *Gibson* v. *United States*, 166 U. S. 269.

[9] An examination of the records of the Court of Claims discloses that upon a new trial subsequently granted in this case the same opinion as that appearing at 49 C. Cls. was adopted.

the claimant had constructed a mill over the Monongahela River. The United States, in improving navigation, raised the river's surface above ordinary high-water level, thereby flooding the lower part of the mill as well as some fast land along the shore. The Court of Claims allowed recovery for the submergence of the uplands above the high-water mark but not for the flooding of the mill building located within the river bed. It will be noted that the building in the *Hood* case, like the embankment in the instant case, was not an obstruction to navigation—at least it had not been ordered removed. Yet the owner was not entitled to any compensation for the flooding of the structure to a point well above the natural high-water mark.

Similarly, in *Great Northern Ry. Co.* v. *Washington Elec. Co.,* 197 Wash. 627, 86 P. 2d 208 (1939), the court, although holding a private power company liable for the washing away of a railway embankment constructed partially within the bed of a navigable river, was careful to note that, had the United States constructed the dam which caused the railroad embankment to be washed away, it would not have been liable.

In reaching a contrary conclusion the court below relied upon *United States* v. *Cress,* 243 U. S. 316, and *United States* v. *Lynah,* 188 U. S. 445. The *Cress* case is not in point, and the *Lynah* case

is no longer an authority in this respect and is in any event clearly distinguishable.

The *Cress* case is not in point because it involved land impressed with no navigation servitude, namely, land in the bed of a *non-navigable* tributary and land above high-water mark. Cf. *Marret* v. *United States,* 82 C. Cls. 1, 14 (1936), certiorari denied 299 U. S. 545. If any dicta in that case be construed as indicating that the Government's servitude in a *navigable* river is "confined to the natural condition of the stream," it is overborne by the actual decisions, discussed above, permitting the Federal Government to make artificial improvements without incurring any liability for damages caused to structures or property located on, under, and over the bed of the stream.[10]

The *Lynah* case can no longer be viewed as an authority on the point for which it was cited by the court below.[11] In that case a riparian proprietor,

[10] The "natural condition of the stream" may often be a relevant factor in determining whether a particular tract of land is subject to any servitude at all, but once the servitude is found to exist, such lands and the structures built thereon must "suffer the consequences" of artificial improvements, such as dredging, damming, etc. Cf. *United States* v. *Appalachian Electric Power Co.*, October Term, 1940, pp. 8–9, 20.

[11] The *Lynah* case is admittedly good law, insofar as it stands for the proposition that an actual and authorized taking gives rise to an implied promise on the part of the Government to pay compensation, a promise enforceable in the Court of Claims. It is for this principle that the case has been so frequently cited (Br. in Opp. 26). But it has

by means of an embankment along the Savannah River, had reclaimed lands between high- and low-water mark which he used for the growing of rice. The Government later constructed a dam which kept the river a foot or two above its former level at low tide. This made it impossible to drain the rice lands which in time became permanently flooded. By a five to three decision, this Court held that there had been a compensable "taking."

The majority opinion written by Mr. Justice Brewer seems to have viewed the Government's navigation servitude as nothing more than the power to utilize the bed of the stream by paying compensation therefor, a mere power of eminent domain (pp. 464–465, 471). Such a narrow construction of the Government's paramount rights in the beds of navigable streams has been repudiated by later decisions permitting the Government to appropriate such lands for navigation purposes wthout the payment of compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Jenkins* v. *United States*, 60 C. Cls. 23, 28–29 (1925), affirmed, 273 U. S. 649; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

If the *Lynah* case be construed as denying the existence of a servitude in that portion of the

---

not once been cited by this Court as a precedent requiring the Government to pay compensation for the "taking" of land impressed with a navigation servitude.

stream between high- and low-water mark, it has been impliedly overruled by the later decisions of this Court recognizing the Government's rights up to the high-water mark. *Willink* v. *United States,* 240 U. S. 572, 580; *Greenleaf Lumber Co.* v. *Garrison,* 230 U. S. 251, 263; *Marret* v. *United States,* 82 C. Cls. 1, 13 (1936), certiorari denied, 299 U. S. 545; *United States* v. *Meyer,* 113 F. 2d 387, 398 (C. C. A. 7), certiorari denied November 25, 1940.

The dubious standing of the *Lynah* case is further emphasized by the fact that a subsequent case involving an adjacent rice plantation on the Savannah River, presenting identical facts, was affirmed only by an equally divided court. *United States* v. *Heyward,* 250 U. S. 633. That case had been twice argued in the Court of Claims and a different Chief Justice on each occasion had expressed his doubts about the correctness of the *Lynah* decision. *Heyward* v. *United States,* 46 C. Cls. 484, 501 (1911), 52 C. Cls. 87, 89 (1917).

Even if the *Lynah* decision is still good law, it is clearly distinguishable from the present case on the same grounds which Mr. Justice Brewer used in distinguishing it from *Mills* v. *United States,* 46 Fed. 738 (S. D. Ga.). Mills, like Lynah, was the owner of a rice plantation along the Savannah River, which had been affected by the Government dam downstream. To prevent his reclaimed lands from being flooded, it was neces-

sary for Mills to raise the levees around his rice fields and to construct a new drainage system at a cost of $10,000. The district court held that there had been no compensable taking. In distinguishing that decision in his opinion in the *Lynah* case Mr. Justice Brewer said (188 U. S. 474):

> Obviously there was no taking [in the *Mills* case] of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. *The court rightfully held that it could not be sustained.* Here [in the *Lynah* case] there is no finding, no suggestion, that by any expense the flooding could be averted * * * we must under the findings regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.[12]

It is submitted that the present case falls within the facts of the *Mills* rather than the *Lynah* decision. The railroad embankment is not completely submerged. It is still being used and will continue to be used by the fast trains between Chicago and the Twin Cities (R. 99–107). The respondents, like Mills, were merely put to some expense in order that they might be able to con-

[12] The *Mills* case is also cited with approval in *Manigault v. Springs*, 199 U. S. 473, 484; *Chicago, B. & Q. Railway v. Drainage Comm'rs*, 200 U. S. 561, 584.

tinue using the bed of the stream. Such injuries are consequential in character and do not constitute a taking within the meaning of the Fifth Amendment. *United States* v. *Lynah,* 188 U. S. 445, 473–474; *Manigault* v. *Springs,* 199 U. S. 473, 484–485; *Bedford* v. *United States,* 192 U. S. 217, 224; *Willink* v. *United States,* 240 U. S. 572, 581.

4. *Even a licensed structure in the bed of a navigable river must "suffer the consequences" of subsequent improvements.*—Possessing the plenary power to exclude private structures from navigable rivers, the United States may make the erection or maintenance of such structures in a navigable river dependent upon a license. *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 268; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 707; *United States* v. *Appalachian Electric Power Co.,* No. 12, October Term, 1940, p. 20. This power has been exercised by Congress through the Rivers and Harbors Act of 1899, which makes it unlawful "to construct or commence the construction of any bridge, dam, dike, or causeway over or in any * * * navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plan shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War," or to build any pier or other structure in a navigable river, where no harbor lines have been established, "except on

plans recommended by the Chief of Engineers and authorized by the Secretary of War." Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151.

While it is true that the railroad company, before realigning its roadbed in 1910, obtained the local army engineer's consent (R. 147–151), the company did not submit its plans to the Chief of Engineers and the Secretary of War as required by the Rivers and Harbors Act of 1899. But even if it had, the Government would not be prevented by any principles of contract or estoppel from making subsequent navigation improvements. Power once exercised is not forever exhausted. The fixing of a harbor line or the issuance of a license to construct a bridge or causeway does not foreclose all subsequent changes. Inconveniences thus caused are *damnum absque injuria*. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 260; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 638; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 420–421. For example, in the *Greenleaf* case the new harbor line cut off 200 feet of the plaintiff's wharf which had been built within the lines originally established by the Secretary of War. But since the wharf rested on land subject to a navigation servitude, the claimant was not entitled to compensation. Compare *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 615, 638; see also *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed with directions to the district court (1) to dismiss from the condemnation proceedings that segment of the railroad embankment which is concededly within the bed of the Mississippi River (R. 123), and (2) to determine whether the other three segments are located on land impressed with a navigation servitude.

FRANCIS BIDDLE,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

VERNON L. WILKINSON,
Attorney, Department of Justice.

JANUARY 1941.

APPENDIX A

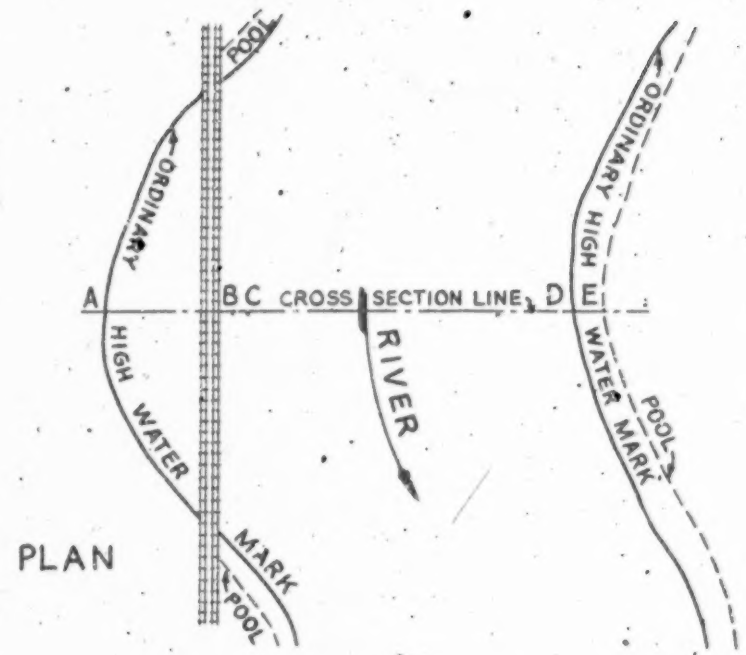
Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, (33 U. S. C., secs. 401, 403):

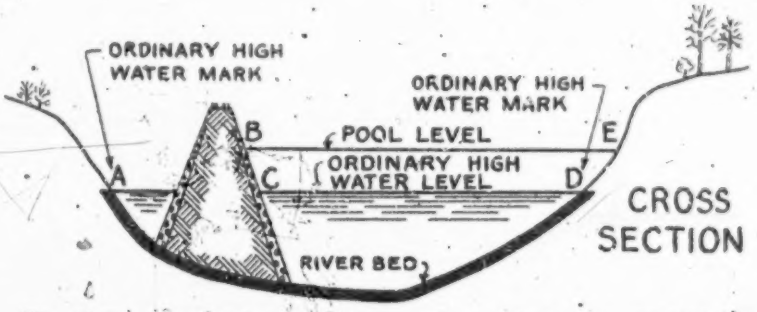
SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Con-

gress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

APPENDIX B





The above plan and cross-section are sketches of a typical "encroachment area." They illustrate, in simplified form, the legal issue and are not intended to represent an accurate picture of the "encroachment areas" in issue here. The Government concedes its liability to pay compensation for flowage of property situated outside of the river bed, as for example between D and E. But it denies liability to pay compensation for the flowage of property within the river bed caused by raising the water surface vertically above ordinary high-water level, as from C to B.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. WHITLOCK,
C. S. JEFFERSON,
Chicago, Ill.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

BLANK PAGE

INDEX

	Page
Question Presented	1
Statement	3
Cross-section at end of petition for writ of certiorari is misleading	4
Undisputed facts	6
Certain misleading and incomplete statements in the petition should be clarified	9
Argument	11
Offer of proof	11
River shore line of 1910 not necessarily the same in 1934	12
Offer of proof immaterial	13
1. Respondents concededly riparian owners in segments in question	13
2. Waterways adjacent to encroachment areas	13
a. Waterway adjacent to claimed encroachment area I in Winona County and claimed encroachment area in Wabasha County a navigable waterway of United States	13
b. Walters Creek (adjacent to claimed encroachment areas II and III in Winona County) not a navigable waterway of the United States	13
3. In Minnesota, riparian owner owns the fee to low water mark on navigable waterways	14
4. Riparian owner also has certain riparian rights out to the navigable channel	15
5. Submerged lands can be reclaimed by riparian owner and presumption is same not reclaimed beyond point of navigability	15
6. Servitude of private lands to navigation confined to natural widths, levels and flows of the river	16
7. Where property of riparian owner between low and ordinary high water marks does not obstruct or interfere with navigation, compensation may be recovered under Fifth Amendment for property taken by the artificial raising of the water	20
a. Respondent's property did not obstruct navigation	23
Cases relied upon by petitioner are not in point	24
Brief summary of some cases relied upon by Government	28
Court properly denied motion of the United States to dismiss from proceedings portions of property claimed to be encroachments in Mississippi River	30
Conclusion	31
As to judgment for lands taken in Winona County	31
As to judgment for lands taken in both Winona and Wabasha Counties	32

Brief Explanation of Illustrative Cross-Sections, Appendices I, II, III, IV 34
Appendix I, illustrative cross-section claimed encroachment area I, Winona County 35
Appendix II, illustrative cross-section claimed encroachment area II, Winona County 36
Appendix III, illustrative cross-section claimed encroachment area III, Winona County 37
Appendix IV, illustrative cross-section claimed encroachment area, Wabasha County 38
Appendix V, portions of Railroad Exhibit 1 reproduced 39

TABLE OF CASES

Bedford vs. United States, 192 U. S. 217, 225 29
Bradshaw vs. Duluth Imperial Mill Co. (1892), 52 Minn. 59 15
Brewer-Elliott Oil & Gas Co. vs. United States (1922), 260 U. S. 77 13
Brooks vs. United States (C. C. A. 8), 146 Fed. 223, 229 13
C., St. P., M. & O. Ry. Co. vs. Rorig (C. C. A. 8), 217 Fed. 953 13
Carli vs. Stillwater St. Ry., 28 Minn. 373 15
Carlson vs. St. Louis River Dam & Improvement Co., 73 Minn. 128, 133 16
Dutton vs. Strong & Goodnow, 1 Black 23 ..... 15, 22
Eaton vs. Boston Ry. (1872), 51 N. H. 505 17
Gibson vs. U. S., 166 U. S. 269 ..... 25, 28
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 263, 276 ..... 26, 27, 29
Hall vs. Hobart (C. C. A. 8), 186 Fed. 426 15
Hanford vs. St. P. & Dul. Rd. Co. (1890), 43 Minn. 104, 111, 118 ..... 14, 15, 22
Hardin vs. Jordan, 140 U. S. 371 13
Harrison, et al., vs. Fite (C. C. A. 8), 148 Fed. 781, 783, 784, 785 ..... 13, 14
Heyward vs. United States (1911), 46 Ct. Cls. 484, 52 Ct. Cls. 87—Affirmed in United States vs. Heyward, 250 U. S. 633 ..... 17, 22, 32
Hobart vs. Hall, 174 Fed. 433 15
Illinois Central Rd. Co. vs. St. of Illinois, et al., 146 U. S. 387 22
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37 (1930) 16, 22
Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26 ..... 16, 22, 26, 32, 33
Jenkins vs. U. S., 60 Ct. Cls. 23 28
Jenkins vs. U. S., 273 U. S. 649 28
Kaukauna Wtr. Pwr. Co. vs. Green Bay & M. Canal Co. (1891), 142 U. S. 254 17
Kincaid vs. United States (D. Ct., W. D., La., N. D.), 37 F. (2d) 602, 607 16

King vs. United States (C. C., D. S. C.) (1893), 59 Fed. 9—Appeals dismissed 164 U. S. 703 ..... 17, 22, 32
Lake Superior Ld. Co. vs. Emerson (1888), 38 Minn. 406 ..... 14, 15
Lamprey, et al., vs. State of Minnesota, 52 Minn. 181, 192 ..... 13, 15
Lewis Blue Point Oyster Co. vs. Briggs, 229 U. S. 82 28
Lowndes, et al., vs. United States, 105 Fed. 838 ..... 22, 32
Manigault vs. Springs, 199 U. S. 473, 487 28
Miller vs. Mendenhall (1890), 43 Minn. 95 ..... 14, 15
Mills vs. U. S., 46 Fed. 738 25
Monongahela Navigation Co. vs. United States, 148 U. S. 312 ..... 15, 17, 22, 32
Morrill vs. S. A. F. W. P. Co., 26 Minn. 222, 226, 228 14
Mountain Copper Co. vs. United States (C. C. A. 9), 142 Fed. 625 30
Paine Lbr. Co. vs. United States (1893), 55 Fed. 854 17
Patrick J. Hurley, Secretary of War, vs. Kincaid (1932), 285 U. S. 95, 104—Reversing United States vs. Kincaid (1931), 49 F. (2d) 768 ..... 17, 22, 26
Peabody vs. United States (1913), 231 U. S. 530, 34 S. Ct. 159. 17
Philadelphia Co. vs. Stimson, 223 U. S. 605 26
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co. (C. C. A. 8), 99 F. (2d) 902, 912 ..... 15, 17
Pumpelly vs. C., B. & M. Co., 13 Wall. 166 17
Richards vs. Washington Terminal Co. (1914), 233 U. S. 546, 34 S. Ct. 654 17
Sanguinetti vs. United States, 264 U. S. 146, 149 28
Scranton vs. Wheeler, 179 U. S. 141 25
State vs. Korrer (1914), 127 Minn. 60 15
State of Oklahoma vs. State of Texas, 258 U. S. 574, 591 14
Steamer Siren and Cargo, etc., vs. United States, 74 U. S. 152, 165 30
Thompkins vs. United States (1910), 45 Ct. Cls. 64, 66 17
United States vs. Barber Lbr. Co. (C. C., Ida., C. D.), 169 Fed. 184, 187, 188 30
United States vs. Chandler-Dunbar Water Power Co., et al., 229 U. S. 53, 33 S. Ct. 667, 673 ..... 27, 29
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134 ..... 17, 22, 33
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170 ..... 17, 22
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714 22
United States vs. Cress, United States vs. Kelly, 243 U. S. 316, 332 ..... 17, 18, 26, 29, 33
United States vs. Doughton, et al. (C. C. A. 4), 62 F. (2d) 936, 938 14
United States vs. Great Falls Mfg. Co., 112 U. S. 645 ..... 15, 17
United States vs. Lynah, 188 U. S. 445 ..... 17, 20, 29, 32
United States vs. James Stinson, et al., 197 U. S. 200, 207 30

United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 853, 854 ..... 19, 22, 32, 33
United States vs. Wheeler Twp. (C. C. A. 8), 66 F. (2d) 977, 984 ..... 20, 22, 33
Union Depot Co. vs. Brunswick, 31 Minn. 297, 301, 303 ..... 15, 16
W. A. Ross Construction Co. vs. Yearsley (C. C. A. 8), 103 F. (2d) 589, 592 29
Weaver vs. Miss. & Rum River Boom Co., 28 Minn. 534, 538 ..... 16, 33
West Chicago Rd. vs. Chicago, 201 U. S. 506 28
Whitaker vs. McBride, 197 U. S. 510, 516 11
Williams, et al., vs. United States (1900), 104 Fed. 50—Affirmed in United States vs. Williams, 188 U. S. 485 ..... 17, 22, 32
Willink vs. United States, 240 U. S. 572 26
Yates vs. City of Milwaukee, 77 U. S. 497, 507 ..... 15, 17, 22, 32

STATUTES CITED

Fifth Amendment to the United States Constitution 20
House Document No. 290, 71st Congress, 2nd Session 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition should be denied because the United States Circuit Court of Appeals for the Eighth Circuit and the District Court for the District of Minnesota correctly decided the questions involved in accordance with the Constitution and laws of the United States and in accordance with the applicable decisions of this Court and no substantial questions are presented to justify the granting of a writ herein.

The official report of opinion in the Court below (R. 188-198) is reported in 113 F. (2d) 919. The District Court did not write an opinion.

QUESTION PRESENTED

The Trial Court denied the Government's offer to prove the railroad and telegraph lines were constructed between

low and ordinary high water elevations of the Mississippi River (R. 146-147).

The Trial Court, at the close of the testimony, denied the motion of the Government to dismiss from the condemnation proceedings the four segments of land here involved (R. 152-155).

The important question determined by the Circuit Court of Appeals and now before this Court for determination is set out in the opinion of the Circuit Court of Appeals (R. 193) and is as follows:

> "Where a riparian owner of land bordering upon a navigable river, only a portion of the entire bed of which is used, and useful for the purposes of navigation under natural conditions, has built an embankment upon that part of his land lying between the ordinary high-water mark and the ordinary low-water mark of the river, which embankment does not interfere with or obstruct navigation, can the United States, for the purpose of improving navigation, build a dam in the river which raises its waters above their natural level and which floods the riparian owner's embankment, without incurring any liability to compensate him for injuries caused solely by raising the waters of the river above their natural level?
>
> "The Government contends that it has the right, in aid of navigation and without payment of compensation, to take or destroy property in the river bed; that this right extends to all property lying between the ordinary high-water marks projected horizontally from shore to shore; that the right of the United States thus to take or destroy property in the river bed without paying compensation includes those portions of such property which are situated above the ordinary high-water mark, and extends to intangible riparian rights, including the right to the natural level, width and flow of the stream.
>
> "The appellees contend that in Minnesota the fee title of a riparian owner extends to ordinary low-water mark,

subject to the paramount public right of navigation under the natural conditions of the stream; that the servitude of riparian lands to the public right of navigation is confined to the natural widths, levels and flows of the river, and that when the Government imposes a more onerous servitude than that upon such lands, it must pay for what it takes."

STATEMENT

The statement contained in the petition for writ of certiorari fails to include many facts essential to a proper understanding and determination of the petition. We will call attention to some of these important omitted facts.

The railroad has existed along the river since about 1870. It is now a double-track railroad and is the main line between Chicago, Milwaukee, St. Paul, Minneapolis and the Pacific Northwest. It is a busy stretch of railroad (R. 115), there being a large number of freight, passenger, and mail trains operated thereover (R. 99). The telegraph and telephone lines are important main trunk lines of the Railroad and Telegraph Companies (R. 115).

The 26 dams constructed across the river and bottom lands in the Upper Mississippi River permit slack-water navigation. That means the Mississippi River, instead of flowing as a stream, is flowing through a series of lakes (R. 113). Lock and Dam No. 5, near Minneiska, raises the natural water levels in the segments of the railroad here involved from 12 to 15 feet above low water elevation (R. 100, Rd. Ex. 2) and 5.6 to 7.5 feet above ordinary high water elevation (R. 140, R. 132).

Cross-Section at the End of Petition for Writ of Certiorari Is Misleading.

The cross-section sketch appearing on page 14 of the petition for writ of certiorari not only is not typical but does not remotely indicate the true situation at any of the claimed encroachment areas in either Winona or Wabasha Counties (Rd. Ex. 1, R. 179, Appendix V). Therefore, respondents have reproduced herein as Appendix I, II, III and IV an illustrative cross-section in each of the four claimed encroachment areas, each of which was reproduced in the briefs in the Circuit Court of Appeals. Appendix V is a portion of Railroad Exhibit 1 showing the three claimed encroachment areas in Winona County. Railroad Exhibit 1, on a reduced scale (R. 179), shows in blue, land which is flooded by the pool at elevation 660 (R. 97). A detailed explanation of this map appears in the record (R. 97-99).

Claimed encroachment areas III and II in Winona County are adjacent to Walters Creek. The end of Wing Dam 33, opposite area III and of Wing Dams 35, 36 and 37, opposite area II, are from 1,300 to 2,750 feet distant from the tracks. The navigable channel commences at the end of these wing dams (Rd. Ex. 1, R. 179, Appendix V). Land between wing dams and railroad is covered with "Brush and Timber" (Rd. Ex. 1, R. 179, Appendix V). Spot elevations show land above ordinary high water elevation distant from the railroad tracks as much as 1,250 feet in area III and as much as 600 to 1,700 feet in area II. Spot elevations above low water are shown still farther away from the railroad (Rd. Ex. 1, R. 179, Appendix II, III and V). In claimed encroachment area I, the near end of Wing Dam 108 is about 100 feet and the river end about 225 feet from the track. Scaling indicates upland extends out from the track for a distance of 50 to 110

feet throughout this claimed encroachment area. Wing Dam 107, near the western edge of this encroachment area, extends about 450 feet out from the track (Appendix V). The purpose of the wing dams, as testified to by the various witnesses, was to keep the channel away from the shore (R. 96) and to keep a deep channel (R. 110, 113). Anything that will restrict the channel between the ends of the wing dams would be helpful to navigation (R. 113).

During the trial, the parties entered into stipulation which, among other things, provided that said stipulation "shall not deprive either of the parties herein from herein proving or disproving the waterway along the claimed encroachments are or are not in fact navigable waterways of the United States" (R. 145). The Government, in its petition and in accordance with the order for immediate possession on August 4, 1934, took respondents' property in Winona and Wabasha Counties (R. 23-31) including the claimed encroachment areas, but did not submit any proof to show whether or not Walters Creek adjacent to areas II and III was or was not a navigable waterway of the United States. The Government did not claim that any structure of respondents' here involved obstructed navigation in the river (R. 137). The Government did not offer to prove any part of the railroad was below ordinary high water mark when the condemnation proceedings were commenced or when immediate possession of the respondents' property was granted. The rejected offer to prove related to a condition claimed to exist in 1909 or 1910 (R. 146, 151).

Undisputed Facts.

1. The District Engineer of the respondent Railroad in December, 1909, wrote to Major Riche, United States District Engineer in charge of this portion of the Mississippi River, stating the Railroad intended to double-track and to make certain changes in its alignment at points shown in red on the map (U. S. Ex. 70, R. 149) and also requesting permission to proceed with the work (R. 147-149). On Exhibit 70, the vertical figure 4800 is a railroad station in the claimed encroachment area in Wabasha County. Railroad Station 4930 was in claimed encroachment area III in Winona County and Railroad Stations 4950 and 4960 were in claimed encroachment area II in said county. That exhibit made on November 9, 1909, shows areas II and III were in "Low marshy land." Stations 4980 and 4990 are in claimed encroachment area I (R. 149). Major Riche, in answer, advised that in the proposed new line he found nothing "prejudicial to the interests of navigation or in any way interfering with the proposed Government improvement of the river" (R. 151).

2. The railroad was made into a double-track railroad and the alignment changed in 1910 (R. 142).

3. The four claimed encroachment areas are shown in the stipulation of the parties (R. 121 and 125) and the three located in Winona County are shown on a larger scale in the portion of Railroad Exhibit 1 hereto attached as Appendix V. The condemnation proceedings included the claimed encroachment areas (R. 6, 9, 13, 15, 16, 17).

4. The testimony was undisputed that the Railroad and Telegraph Companies' embankments, tracks, culverts, bridges, poles and other facilities within the limits of this

ppeal were in good condition and adequately protected to ithstand river and ice action under natural conditions of ie Mississippi River and its tributaries (R. 116).

5. In Winona County, respondents have not stipulated or onceded that any portion of their property was located on nd below ordinary high water elevation of the river when roceedings herein were commenced or possession of their roperty taken by the Government (R. 118-120). Such a oncession was made in Wabasha County (R. 123).

6. In the summarized statement, it is conceded "compe- nt and sufficient evidence was introduced by the Railroad ompany and the Government to support and sustain the erdict as to the need for protecting the property of the ailroad and Telegraph Companies under the new changed onditions and to sustain the verdict as to the amount there- f as to each item of damage claimed by and allowed to the ailroad and Telegraph Companies by the jury" (R. 118).

7. The summarized statement concedes "the character, mount and necessity for the measures taken to protect the ailroad and Telegraph Companies from the waters raised nd impounded by Lock and Dam No. 5 and the reasonable ost of such protective measures is not at issue on this ap- eal by reason of the stipulation of the parties. * * * or that reason, the voluminous testimony showing the ac- ual protective measures taken and the cost thereof has been mitted in this Bill of Exceptions" (R. 118).

8. The petitioner conceded the structures of the Railroad nd Telegraph Companies in each of the claimed encroach- ent areas were located on land which was at an ele- tion above the low water (R. 144) but offered to prove the ructures were constructed between low and ordinary high ater mark elevations of the river (R. 143, 146).

9. It was conceded by the Government's attorneys that the 669 pool will raise the river water level six or eight feet above the elevation claimed by the Government to be the ordinary high water mark of the river (R. 132-133). The proof showed it would be 5.6 feet to 7.5 feet in the claimed encroachment areas (R. 140).

10. The Government conceded no damage would occur to the Railroad and Telegraph Companies unless the Government artificially raised the water level of the Mississippi River to a point higher than ordinary high water mark (R. 132-133, 142-143), and "that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark" (R. 146).

11. "The Railroad Company is the riparian owner in the segments involved in this appeal" (R. 145).

12. It was conceded by counsel for the Government that the construction of the railroad between low water mark and ordinary high water mark did not actually interfere with navigation but it was claimed same became a financial obstruction if the Government had to pay compensation for the cost of protecting same against waters raised by the Government's lock and dam (R. 135-137).

13. The record shows that all lands shown in blue on Railroad Exhibit 1 (R. 179) were covered with timber. The trees ranged from 48 inches in diameter down to brush (R. 98).

14. Immediate possession of the easement in respondents' property including the portion in the four claimed encroachment areas was taken by the Government on August 4, 1934 (R. 25-31, 6, 13).

Certain Misleading and Incomplete Statements in the Petition Should Be Clarified.

On page 3 of the petition, it is stated in substance that by reason of the removal "of the timber and underbrush in the margins of the river and in the area to be flooded" the railroad "embankment was thereby exposed to greater wind, wave and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment" (R. 116). This is only a part of the picture. In the agreed summarized statement of facts, it is stated:

> "The testimony was undisputed. The Railroad and Telegraph embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand river and ice action under natural conditions of the Mississippi River and its tributaries.
>
> "The testimony of each of said witnesses was that as to the portions of the Railroad and Telegraph properties included in this appeal, certain protective measures had to be taken in order that such properties could continue to be operated in the same safe and efficient manner after the raising of the water to pool level as they were operated under natural conditions of the Mississippi River. * * *
>
> "All of the witnesses testified that the impounding of the river water upstream from Dam No. 5 to the normal pool level would cause water, and, in the winter, ice, to strike the railroad embankments at a much higher elevation than under natural ordinary stages and flows of the Mississippi River. That the railroad embankments because thereof would be saturated at least up to the pool level and needed riprap (rock) protection to stabilize the embankments so as to safely carry the heavy engines and trains operating on the railroad. That riprap was required to protect the railroad embankments

from wave action on the new pool level and also to protect such embankments from ice movement on the pool caused by expansion and contraction in the winter and from movement of ice floes on the spring breakup caused by wind and current.

"They all testified that embankment protection (rock riprap) was required upon the railroad embankments at the locations where it was in fact placed and proposed by the Railroad in the areas covered by this appeal. The only dispute concerned the quantity of and elevation to which such riprap should be carried above normal pool elevation."

On page 4 of the petition, it is stated the Railroad, in double-tracking its railroad placed "portions of their embankment across the bends of the Mississippi * * *." This is both misleading and incorrect. In claimed encroachment areas II and III, the river bends away from the railroad and is located from 1,300 feet to 2,700 feet distant from the railroad tracks. A comparison of this actual situation with the cross-section referred to on page 14 of the petition clearly shows that both the statement and cross-section give an improper picture of the true situation (U. S. Ex. 70, R. 149, Ex. "A," R. 125, 121, Rd. Ex. 1, R. 179, and Appendix V).

On page 5 of the petition, line 3, it is suggested the obstructions to navigation referred to by the Trial Court referred only to those which were a "menace to navigation." We do not contend that an obstruction has to necessarily be a menace before the Government can require its removal. It is our view the Government can require the removal of structures which interfere with, impede and obstruct navigation as well as those which are a menace to navigation.

On page 5 of the petition, it is stated the Appellate Court held the flooding of appellees' property above ordinary high water mark was a compensable taking even though the dam-

aged structures were located in the bed of the stream (R. 188-198). It should be kept in mind the Circuit Court of Appeals, in using the language similar to that just referred to, was referring to the bed of the stream as including all of the portions of the low lands which were below ordinary high water mark elevation, even though such low lands with timber, brush and willows growing thereon, extended for hundreds and, in some instances, thousands of feet on each side of the main stream of the Mississippi River (Appendix V).

ARGUMENT

The Offer of Proof.

The Government offered to prove that three segments of respondents' property in Winona County and one segment in Wabasha County, each segment at times being referred to as an encroachment area, "are constructed on land which is located below ordinary high water mark and above low water mark. * * * The Government concedes the embankments were constructed above low water mark" (R. 146, 67).

Respondents objected to the offer of proof upon the ground, among others, "that the fact which the Government proposes to prove is immaterial" (R. 147) and that the waterway adjacent to claimed encroachment areas II and III (Walters Creek) is not a navigable waterway of the United States (R. 147). The Court sustained the objection to the offer of proof (R. 147, 67).

The exhibits under discussion in connection with said offer of proof related to conditions existing in 1909 prior to the double-tracking in 1910 (see Gov. Exs. 69, 70, 71, R. 147-151) (Rd. Ex. 2, Gov. Ex. 9, as to location of original ground line prior to 1910, R. 102, 141).

As to the segment of land in Wabasha County, after the

trial, by stipulation, appellees conceded their railroad embankment not only in 1910 but also when the petition for condemnation was filed in 1933 was located on land between low and ordinary high water elevations of the river (R. 123, 14).

However, the Circuit Court of Appeals, in its opinion, stated:

> "For the purposes of this opinion, we shall assume that the 'encroachment areas' are all upon lands lying below ordinary high water mark and above low water mark" (R. 191).

The three claimed encroachment areas in Winona County are indicated on the portion of Railroad Exhibit 1 attached hereto as Appendix V. The waterway immediately adjacent to and riverward from the so-called encroachment areas II and III, designated "Walters Creek," it is asserted by appellees, was not a navigable waterway of the United States, and the offer of proof was objected to on that ground (R. 147). Most of the evidence showing this fact was excluded from the record on appeal to the Circuit Court of Appeals by the United States District Judge who passed upon the record after the death of the Trial Judge (His Honor, Judge Molyneaux) upon the ground such record was immaterial on this appeal.

The River Shore Line of 1910 Not Necessarily the Same in 1934.

Even if it be a fact that the Railroad constructed its new alignment in 1910 between low and ordinary high water elevations, such fact is no evidence that in 1934, when immediate possession was taken by the Government, the shore line of the Mississippi River had continued to be the same.

Brooks vs. United States (C. C. A. 8), 146 Fed. 223, 229.
C., St. P., M. & O. Ry. Co. vs. Rorig (C. C. A. 8), 217 Fed. 953.

In fact constant changes are taking place in the Mississippi River shore lines.

Harrison, et al., vs. Fite (C. C. A. 8), 148 Fed. 781, 785.

The Offer of Proof Was Immaterial.

Many cogent reasons exist for sustaining the holding of the Trial Court that the offer of proof was immaterial (R. 145-147). The same reasons indicate the respondents are entitled to receive compensation from the Government for the flowage easements taken in the property here involved, even though it be assumed (contrary to the fact in Winona County) the railroad, when immediate possession of same was taken by the Government, was located between low and ordinary high water elevations.

1. Respondents are concededly riparian owners in the segments in question (R. 145).[1]

2. The waterway (Mississippi River) adjacent to claimed encroachment area No. I in Winona County and the claimed encroachment area in Wabasha County is a navigable waterway of the United States (Rd. Ex. 1, R. 179, Appendix I, IV and V). On the other hand, the waterway (Walters Creek) adjacent to claimed encroachment areas II and III in Winona County is not a navigable waterway of the United States (Rd. Ex. 1, R. 79, Appendix II, III and V).

---

[1] "The question of title of a riparian owner is one of local law."
Whitaker vs. McBride, 197 U. S. 510, 516.
Hardin vs. Jordan, 140 U. S. 371.
Brewer-Elliott Oil & Gas Co. vs. U. S. (1922), 260 U. S. 77.
Lamprey, et al., vs. St. of Minn., 52 Minn. 181, 192.

Walters Creek Was Not a Navigable Waterway of the United States.

At the trial, the Government was by stipulation permitted to prove Walters Creek was a navigable waterway of the United States (R. 145). Respondents' objection to the Government's offer of proof (Assignment of Error 12) asserted, as one of its grounds, the waterway along claimed encroachment areas II and III was "not a navigable waterway of the United States" and "not a waterway in which there is any practical possibility of its being used as a highway for interstate or foreign commerce" (R. 147).

The Government did not prove or offer to prove this waterway was a navigable waterway of the United States. They did not prove any past or prospective commerce, or that boats had or could enter or use this waterway, or that any habitation, industry, building or commodity for shipment existed along this waterway.

As indicated on Railroad Exhibit 1, the creek decreases in size as one goes upstream, passing under the railroad at Bridge L-82 (R. 179, Appendix V).

Such a waterway is not a navigable waterway of the United States.[2]

3. In Minnesota, the riparian owner owns the fee to low water mark on navigable waterways.[3]

Beyond low water mark, the State owns the bed "in trust".

---

[2]Harrison vs. Fite (C. C. A. 8), 148 Fed. 781, 783, 784.
United States vs. Doughton, et al. (C. C. A. 4), 62 F. (2d) 936, 938.
State of Oklahoma vs. State of Texas, 258 U. S. 574, 591.

[3]Morrill vs. S. A. F. W. P. Co., 26 Minn. 222, 226, 228.
Lake Superior Ld. Co. vs. Emerson (1888), 38 Minn. 406.
Hanford vs. St. P. & D. Rd. Co. (1890), 43 Minn. 104, 111.
Miller vs. Mendenhall (1890), 43 Minn. 95.

for the general public but apparently has no *"jus privatum"* in the beds of navigable waterways.[4]

The *"jus privatum"* in the beds of such streams is in the riparian owner subject only to the *"jus publicum"* in the State.[5]

4. The riparian owner in Minnesota, also has certain riparian rights such as the right to build wharves, etc., out to the navigable channel and such wharves, etc., if they do not actually obstruct or interfere with the navigation, cannot be taken, even by the State, without just compensation.[6]

5. If public interests are not prejudiced, the submerged lands can be reclaimed by the riparian owner from a navigable waterway and thereby same become dry land and it is to the interests of the State that such waste lands be reclaimed.[7]

---

[4]State vs. Korrer (1914), 127 Minn. 60.
Bradshaw vs. Duluth Imperial Mill Co. (1892), 52 Minn. 59.

[5]Hanford vs. St. P. & Dul. Rd. Co., supra.
Hobart vs. Hall, 174 Fed. 433.
Hall vs. Hobart (C. C. A. 8), 186 Fed. 426.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co. (C. C. A. 8), 99 F. (2d) 902, 912.

[6]Union Depot Co. vs. Brunswick, 31 Minn. 297, 301.
Carli vs. Stillwater St. Ry., 28 Minn. 373.
Miller vs. Mendenhall, 43 Minn. 95.
Lamprey, et al., vs. State of Minn., 52 Minn. 181, 192.
Lake Superior Land Co. vs. Emerson, 38 Minn. 406.
State vs. Korrer, 127 Minn. 60.
Hanford vs. St. P. & D. Rd. Co., supra, at p. 118.
Yates vs. City of Milwaukee, 77 U. S. 497, 507.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Dutton vs. Strong & Goodnow, 1 Black 23.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, page 912.

[7]Hanford vs. St. P. & Dul. Rd. Co., supra, page 118.
Union Depot Co. vs. Brunswick, supra.
Bradshaw vs. Duluth Imperial Mill Co., 52 Minn. 59.

If land is reclaimed by artificial means, the presumption is same has not been reclaimed beyond the point of navigability. See *Union Depot Co. vs. Brunswick, supra,* at page 303. As therein stated, "the usual and often the only practical way on the Mississippi and its tributaries (is) by reclaiming the land by artificial filling in with earth out to the requisite depth of water."

6. "The servitude of private lands to navigation is confined to the natural widths, levels and flows of the river." If more is taken, the Government must compensate the owner for such taking.[8]

All of the compensation awarded to the respondents herein was awarded to compensate them for damages caused by the artificial changing and raising of the levels of the Mississippi River and its tributaries permanently. All of the damages herein involved concededly are caused solely by the natural levels of the river being raised by Lock and Dam No. 5 above ordinary high water mark (R. 146, 132, 133, 142-143).

The water levels are raised by the dam in each of the four claimed encroachment areas 15.3 feet, 14.8 feet, 14 feet, and 12 feet above low water (Rd. Ex. 2 and Appendix I, II, III, IV) and 7.5 feet, 7.1 feet, 6.9 feet and 5.6 feet respectively above ordinary high water elevation (R. 140, Rd. Ex. 2 and Appendix I, II, III and IV).

The Federal Courts clearly support the principle just stated.[9]

---

[8] Weaver vs. Mississippi & Rum River Boom Co., 28 Minn. 534, 538. Carlson vs. St. Louis River Dam & Improvement Co., 73 Minn. 128, 133.

[9] See Kincaid vs. United States (D. Ct., W. D., La., N. D.), 37 F. (2d) 602, 607.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37 (1930).
Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26.

In *United States vs. C., B. & Q. Rd. Co.* (C. C. A. 8), 82 F. (2d) 131 (Writ of Certiorari denied, *U. S. vs. C., B. & Q. Rd. Co.*, 298 U. S. 689), at page 134, it is said:

> "As a foreword, it may be premised that, if well-nigh the unanimous voice of *stare decisis* shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi, even though a navigable stream, and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of the appellee) beyond that provided by nature, could be obtained by appellant only by the exercise of the sovereign right of eminent domain, and the payment to appellee of just compensation for the damages by it sustained."

A leading case is *United States vs. Cress, United States vs. Kelly*, 243 U. S. 316, 332. In those cases, certain locks

---

United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.
United States vs. Lynah, 188 U. S. 445.
Yates vs. City of Milwaukee, supra.
Pumpelly vs. C., B. & M. Co., 13 Wall. 166.
Eaton vs. Boston Ry. (1872), 51 N. H. 505.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Kaukauna Wtr. Pwr. Co. vs. Green Bay & M. Canal Co. (1891), 142 U. S. 254.
Monongahela Navigation Co. vs. United States, supra.
Paine Lbr. Co. vs. U. S. (1893), 55 Fed. 854.
King vs. United States (C. C., D. S. C.) (1893), 59 Fed. 9—Appeals dismissed, 164 U. S. 703.
Williams vs. U. S. (1900), 104 Fed. 50—Affirmed in United States vs. Williams, 188 U. S. 485.
Thompkins vs. United States (1910), 45 Ct. Cls. 64, 66.
Heyward vs. United States (1911), 46 Ct. Cls. 484, 52 Ct. Cls. 87—Affirmed in United States vs. Heyward, 250 U. S. 633.
Peabody vs. United States (1913), 231 U. S. 530, 34 S. Ct. 159.
Richards vs. Washington Terminal Co. (1914), 233 U. S. 546, 34 S. Ct. 654.
Patrick J. Hurley, Secretary of War, vs. Kincaid (1932), 285 U. S. 95—Reversing United States vs. Kincaid (1931), 49 F. (2d) 768.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, p. 912.

and dams backed up water into White Oak and Miller Creeks. The Trial Court failed to find whether White Oak Creek was or was not navigable. This Court, in said cases, discusses the rights of States and the authority of Congress as to navigable streams. On page 319, this Court said:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks * * * *subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations,* * * * *the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation.* (*Monongahela Navigation Co. vs. U. S.*, 148 U. S. 312, 336; *U. S. vs. Lynah*, 188 U. S. 445, 465, 471.)"

On page 321, the Court says:

> "* * * *riparian owners have a right to the enjoyment of the natural flow without burden of hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right* (citing cases in note)."

On page 326, the Court further said:

> "*But the authority to make such improvements (raising WATER LEVELS BY dams, etc.)* is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, *must be exercised, when private property is taken, in subordination to the Fifth Amendment. Monongahela*

Navigation Co. vs. United States, 148 U. S. 312, 336; *United States vs. Lynah*, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

The Railroad and Telegraph Companies, in building their railroad and telegraph lines *"had a right to rely upon the history of the height to which the water had risen at various flood periods and its natural height in determining the elevation to which it was to be constructed.* If the elevation of the water is raised beyond its natural stage by artificial means and a flowage easement established, as in the instant case, it would seem that the owner of the land affected must be justly compensated for the damages thus sustained."

See *United States vs. Wabasha-Nelson Bridge Co.* (C. C. A. 7), 83 F. (2d) 852, 854.

The public easement of navigation on the river fluctuates, ordinarily being low in the winter and summer, higher in the fall and highest in the spring. The Government has no right to continuously maintain the water levels at the spring or fall levels. When the flow of the water in the river provided by nature is at a low level, the servitude of public navigation must necessarily be at the same low level.

In the instant case, the Government has taken from respondents the right to maintain their railroad and telephone and telegraph lines at the natural levels of the river. They had and exercised this right prior to the commencement of

the condemnation proceedings here involved.

See *United States vs. Wheeler Township* (C. C. A. 8), 66 F. (2d) 977, 984.

We submit the foregoing decisions demonstrate in the instant case: (1) that the public easement of navigation is limited to the natural widths, levels and flows of the river, (2) that the respondents are entitled to the continuous maintenance of the levels, widths and flows provided by nature in Walters Creek and in the Mississippi River, and (3) that all property of the respondents which was adequately protected against and, therefore, not affected by the natural levels, widths and flows of Walters Creek and the Mississippi River was private property and to the extent that such property is affected by the alteration in the natural flows and the raising of the natural levels by Dam No. 5, compensation must be made to respondents.

7. This Court has definitely held where property of a riparian owner is located between low and ordinary high water elevations of a navigable river and same does not obstruct or interfere with navigation in the river, the owner of such property may recover compensation from the Government for a partial taking of such property caused by raising the water levels above natural levels.

So far as here material, the Fifth Amendment to the United States Constitution provides:

> "No person shall be * * * deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation."

In *United States vs. Lynah*, 188 U. S. 445, the principal question involved was whether or not the artificial raising of the water levels of a navigable river, so as to destroy

Lynah's rice plantation located between low and ordinary high water marks of the Savannah River, constituted a taking of Lynah's property where such water levels were raised in aid of navigation under the commerce clause of the Federal Constitution. On page 468, this Court said:

> "Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate title. * * *.
>
> "Some question is made as to the meaning of the findings. *It appears* from the 5th finding, as amended, *that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other;* that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. * * * both by seepage and percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the Government has undertaken. Does this amount to a taking?"

On page 474, the Court said:

> "Following the settled law of this Court, we hold that there has been a taking of the lands for public uses, and that the Government is under an implied contract to make just compensation therefor."

The Lynah case is in accord with earlier decisions and has been followed in a number of decisions.[10]

Attention is called to the fact that in the Heyward case, the Savannah River was only raised 22 inches above low water on the property there involved. In the instant case, at the four claimed encroachment areas, the river was raised from 12 feet to 14.8 feet above low water and from 5.6 feet to 7.5 feet above ordinary high water elevation (Rd. Ex. 2, R. 140, Appendix I, II, III and IV).

In the Wabasha-Nelson Bridge Co. case, as shown on page 853, the base of the roadway embankment in question was in some places above ordinary high water mark and at other places below such level. The following statement by the Court shows this to be the fact:

---

[10] **Williams, et al., vs. United States** (1900), 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9—Appeal from this decision dismissed by United States Supreme Court in **United States vs. King**, 164 U. S. 703.
Lowndes vs. United States, 105 Fed. 838.
Heyward vs. United States, 46 Ct. Cls. 484.
United States vs. Heyward, 250 U. S. 633.
Illinois Central Rd. Co. vs. St. of Illinois, et al., 146 U. S. 387.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Dutton vs. Strong & Goodnow, 1 Black 23.
Hanford vs. St. P. & Dul. Rd. Co., 43 Minn. 104, 118.
Jacobs vs. United States, 290 U. S. 13.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ of Cert. denied in **United States vs. C., B. & Q. Rd. Co.**, 298 U. S. 689.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Hurley vs. Kincaid, 285 U. S. 95, 104.

"It was also determined that an ordinary high water stage would not exceed an elevation of 665 or 666 feet; thus leaving a vertical spread of 10 to 11 feet at the time of an ordinary high water. The natural flow of the water at such times would contact the embankment at this elevation, but would fluctuate and not remain the same at all times. During many months of the year the water level would, of course, be much lower than that elevation."

Respondents' Property for Which Compensation Was Herein Granted Did Not Obstruct Navigation.

At low water stages, the entire railroad embankment in each of the four claimed encroachment areas rests upon dry land. There are wing dams riverward from the railroad in each area (Rd. Ex. 1, R. 179, Appendix V). The purpose of these wing dams is to keep the channel away from the shore (R. 96). "Anything that would restrict the channel between the ends of the wing dam would be helpful to navigation" (R. 113). In the encroachment area in Wabasha County, the Government constructed Wing Dam No. 48 and Wing Dam No. 49 (Rd. Ex. 1, R. 179). In Winona County, it has constructed Wing Dam No. 33 in area III, Wing Dams 35, 36 and 37 in area II, and Wing Dams 107 and 108 in area I (Appendix V). In areas II and III, the nearest edge of the channel of the river varies from 1,300 to 2,100 feet at right angles from the railroad with timber, willows and brush on the intervening land (Appendix V).

As shown by House Document No. 290, 71st Congress, 2nd Session:

"These dams (including Dam No. 5) would provide a nine-foot depth in the section of the river canalized."

Counsel for the Government did not claim any of the re-

spondents' structures would obstruct navigation (R. 135, 137). Their sole claim was if required to pay for taking such structures, same would constitute a financial burden (R. 135, 137). The Circuit Court of Appeals found the railroad embankment was not an obstruction to navigation stating the "embankment does not interfere with or obstruct navigation" (R. 193).

The Circuit Court of Appeals, in its opinion, further very aptly said:

> "Since the embankment and structures of the appellees are not claimed to be, and are not, obstructions to navigation, and have not been determined by Congress to be such obstructions, we think that, under the rule announced in the Lynah and Cress cases, the flooding of appellees' property, here involved, above ordinary high water mark was a taking of their property, for which they were entitled to compensation" (R. 197-198).

Cases Relied Upon by Petitioner Are Not in Point.

The misleading cross-section appearing as an appendix to the petition for a writ of certiorari gives the erroneous impression that the railroad embankments are located in the channel of the river.

In Wabasha County, the railroad in the claimed encroachment area is on the bank of the river as indicated in Appendix IV.

In Winona County, the railroad, in encroachment area I, is landward from but near the Minnesota bank of the river (Appendix I). Area II is about 1,400 feet from the channel of the river (Appendix II), and area III is about 2,000 feet from the channel of the river (Appendix III) (see also Appendix V).

It should be kept in mind that the availability of the property of a riparian owner between low and ordinary high water marks on a tidal water is very different from the availability of land so located on a navigable inland river. On the Mississippi River, portions of the land between low and ordinary high water elevations could at certain short periods of the year be made available for navigation of canoes, rowboats and duckboats if the willows, brush, trees and other vegetation were cleared from such area. Such areas, however, have no practical usability as a highway of interstate commerce. On the other hand, in tidal waters, as brought out in the Willink case, the low and ordinary high water levels are constantly changing by the tides and the area between said elevations is available for substantial commerce during some periods of each day.

Respondents are of the same view as that expressed by the Circuit Court of Appeals (R. 197-198) that the Lynah and Cress cases are controlling in the instant case.

In the Lynah case, the land between low and ordinary high water marks was used as a rice plantation. In the instant case, such land was used as the main line of a railroad and telegraph company. This Court, in the Lynah case, considered and discussed three of the cases now relied upon by the Government, to-wit:

Scranton vs. Wheeler, 179 U. S. 141.
Gibson vs. U. S., 166 U. S. 269.
Mills vs. U. S., 46 Fed. 738.

Therefore, a further discussion of said cases would seem to be unnecessary.

The petitioner, apparently, is of the view that the Lynah case should be re-examined by this Court, asserting same to be inconsistent with such cases as:

Philadelphia Co. vs. Stimson, 223 U. S. 605.
Willink vs. U. S., 240 U. S. 572.
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 276.

The Lynah case has, of course, been cited by this Court in many decisions subsequent to the decisions in the cases just mentioned. For example, see:

Jacobs vs. U. S., 290 U. S. 13, *27.*
U. S. vs. Cress, 243 U. S. 316, *326.*
Hurley vs. Kincaid, 285 U. S. 95, 104.

The Circuit Court of Appeals (R. 196-197) brings out distinguishing features. Special attention is also called to the following in said opinion (R. 196):

> "It is interesting to note that in the Cress case, at pages 320-321 of 243 U. S., the Supreme Court cites *Greenleaf-Johnson Lumber Co. vs. Garrison, supra; Philadelphia Co. vs. Stimson, supra,* and *Willink vs. United States, supra,* in support of the general rule 'that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the Government control and regulation necessary to give effect to that right'; and then points out that 'it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures'; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

The structures for which Willink claimed damages were within the harbor limits of a navigable tidal waterway. The structures were held to be obstructions to navigation. The Government threatened to take the property, changed its plans and, in fact, did not take the property. The case did not involve damages caused by artificially raised water levels.

In *Greenleaf-Johnson Lbr. Co. vs. Garrison, supra,* in quoting from the Stimson case, *supra,* on page 262, this Court said:

> "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation."

The Garrison case also involved structures in a navigable tidal water. The Government proposed to dredge the portion of the waterway where said structures were located. The structures were within the harbor lines and were actual obstructions to navigation. The case did not involve the artificial raising of the water levels.

This Court, on page 262 of the Garrison case, distinguishes it from *Yates vs. City of Milwaukee, supra,* as follows:

> "* * * There was no proof in the record that the wharf involved was in fact an obstruction to navigation * * *"

There was no such proof in the instant case. On the contrary, the railroad embankments, as previously pointed out, have been aids to navigation.

In *United States vs. Chandler-Dunbar Water Pwr. Co., et al.,* 229 U. S. 53, 33 S. Ct. 667, 673, Congress by act had determined that the whole river between the American bank and the International line, etc., was necessary for the par-

poses of navigation. Attention is called to the fact that compensation was awarded under finding of fact No. 45 of the Trial Court in the case for parcels 95 and 96, same being filled in land used as a wharf on deep water.

A brief summary of our view of some of the cases relied upon by the Government may be helpful.

1. We do not claim the Government cannot deepen the channel of a navigable waterway.[11]

2. We do not claim the Government may not, in a proper case, improve and restrict the navigable channel and thereby take the waterway from the riparian owner in aid of navigation by cutting off his access to the river.

Gibson vs. United States, 166 U. S. 269.

3. We concede the burden is upon the land owner to prove the Government structures will in fact cause his property to be overflowed. Speculation and conjecture that such property may be damaged is not enough.

Sanguinetti vs. United States, 264 U. S. 146, 149.

4. We concede a land owner is not entitled to an injunction to enjoin the damming of a waterway, even though such land owner will be overflowed to a minor extent, and this is particularly true where a reasonable provision is made to pay lawful compensation.

Manigault vs. Springs, 199 U. S. 473, 487.

5. To recover, we concede there must be an actual invasion of claimant's land. A Government operation six miles

---

[11] Lewis Blue Point Oyster Co. vs. Briggs, 229 U. S. 82.
West Chicago Rd. vs. Chicago, 201 U. S. 506.
Jenkins vs. U. S., 60 Ct. Cls. 23.
Jenkins vs. U. S., 273 U. S. 649.

upstream from claimant's land that did not involve invasion of any part of his land is not sufficient.

Bedford vs. United States, 192 U. S. 217, 225.

6. The United States is not responsible to riparian owners for consequential damages from the mere deflection of water by reason of structures lawfully constructed in aid of navigation.[12]

7. We admit property owners cannot obstruct the channel of a navigable river in its natural state and if such property owner does so obstruct the channel, he owes the uncompensated duty to remove the obstruction, particularly where Congress has held the portion of the river where the obstruction exists is necessary for navigation.

United States vs. Chandler-Dunbar Co., 229 U. S. 53, 33 S. Ct. 667.

8. But we do claim the Government cannot by the construction of a dam, artificially raise the water levels and take the property of a riparian owner or substantially impair the usefulness of such property such as a rice plantation, farm or such as a railroad or telegraph line without compensating the owner under the Fifth Amendment.

United States vs. Cress, 243 U. S. 316.

United States vs. Lynah, 188 U. S. 445.

---

[12]Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 263.
W. A. Ross Constr. Co. vs. Yearsley (C. C. A. 8), 103 F. (2d) 589, 592.

The case of W. A. Ross Construction Co. vs. Yearsley, supra, on page 592, distinguishes the Lynah and Cress cases.

The Court Properly Denied Motion of the United States, Made at the Close of the Testimony, to Dismiss From the Proceeding the Portion of the Property Claimed to Be an Encroachment in the Mississippi River.

(Assignment of Error No. 13.)

This assignment of error was abandoned by the Government's attorney on oral argument before the Circuit Court of Appeals but, inasmuch as the motion to dismiss is referred to on page 5 of the petition, it may be wise to briefly refer to this motion.

The motion was not made timely. The Government is the same as any other litigant when it brings an action.[13]

The Trial Court, in denying the motion to dismiss, stated rather fully his reasons for so doing (R. 154). It should be kept in mind that at the time this motion was made, hearing had been held before the Commissioners and award made to the respondents. Appeal had been taken to the District Court. Immediate possession of the property, including the four segments involved, had been ordered by the Court and taken by the petitioners. The water had been artificially raised against the embankment and through the railroad's bridges and culverts to the pool level. The Railroad and Telegraph Companies had taken protective measures as to their property and, in so doing, had expended large sums of money. The trial on the appeal had been completed so far as the taking of the testimony was concerned. During the trial, the petitioners had submitted to the Trial Court the

---

[13] **Mountain Copper Co. vs. United States** (C. C. A. 9), 142 Fed. 625.
United States vs. Barber Lbr. Co. (C. C., Ida., C. D.), 169 Fed. 184, 187, 188.
United States vs. James Stinson, et al., 197 U. S. 200, 207.
The Steamer Siren and Cargo, etc., vs. United States, 74 U. S. 152, 165.

question as to whether or not the respondents were entitled to recover compensation for the taking of their property in the four segments here involved. It was only after an adverse ruling had been made by the Trial Court that the Government decided and tried to dismiss the segments in question from the proceeding.

We submit the Government is the same as any other litigant before the Court and could not, after such adverse rulings and expenditures of money by the respondents, dismiss the property involved in this appeal from the proceeding.

CONCLUSION

It is true the principles here involved are important to the Government, Railroad, Telegraph and Telephone and Power Companies whose lines are located on the bottom lands of the Mississippi River and many other inland streams, as well as to the much larger group of riparian owners who use such bottom lands for grazing, hay, woodlots, rice cultivation, artificial fish ponds, piers, wharves and embankments to reach the navigable channel of such rivers.

As to the Judgment for Lands Taken in Winona County.

The Government's offer to prove the respondents' structures in 1910 were constructed between low and ordinary high water mark was immaterial as no offer was made to prove such condition existed in 1933 when condemnation proceedings were commenced or on August 4, 1934, when immediate possession was taken. The Government failed to prove Walters Creek adjacent to claimed encroachment areas II and III was a navigable waterway of the United States, although permitted so to do by stipulation of the parties (R. 145, 147).

As to the Judgment for Lands Taken in Both Winona and Wabasha Counties.

The respondents conceded their embankments in Wabasha County were between low and ordinary high water elevations of the river and if we assume (contrary to the fact) that the same situation existed in the claimed encroachment areas in Winona County, the offer of proof was immaterial because it is, without dispute, shown that no portion of respondents' property or structures invaded the navigable channel of the river and did not obstruct or interfere with navigation therein (R. 135-138),

Under such circumstances, this Court has held riparian owners are entitled to compensation from the United States where the use of their property located between low and ordinary high water marks is destroyed or the use thereof substantially impaired.[14]

The servitude of respondents' property to navigation is confined to the natural widths, levels and flows of the river, whereas all of the damage here involved and the compensation awarded respondents therefor was due solely to the artificial raising of the Mississippi River water levels by the

---

[14] United States vs. Lynah, 188 U. S. 445.
Williams, et al., vs. United States, 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9.
United States vs. King, 164 U. S. 703.
Heyward vs. United States, 46 Ct. Cls. 484, 52 Ct. Cls. 87.
United States vs. Heyward, 250 U. S. 633.
Lowndes, et al., vs. United States, 105 Fed. 838.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 853.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Jacobs vs. United States, 290 U. S. 13, 16.

Government to a point in excess of ordinary high water mark.[15]

The Trial Court properly denied the motion of the United States made at the close of all the testimony to dismiss from these proceedings the property involved here. Such motion was not made timely.

We respectfully submit the Circuit Court of Appeals for the Eighth Circuit properly affirmed the judgments of the United States District Court, District of Minnesota, First Division, in the proceedings involving property of respondents in both Winona and Wabasha Counties.

Dated November 27, 1940.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. WHITLOCK,
C. S. JEFFERSON,
Chicago, Ill.

---

[15] United States vs. Cress, 243 U. S. 316, 319.
Jacobs vs. United States, 290 U. S. 13, 16.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ denied, United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Weaver vs. Miss. & Rum River Boom Co., 26 Minn. 534, 538.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, 984.

ILLUSTRATIVE CROSS-SECTIONS I, II, III AND IV

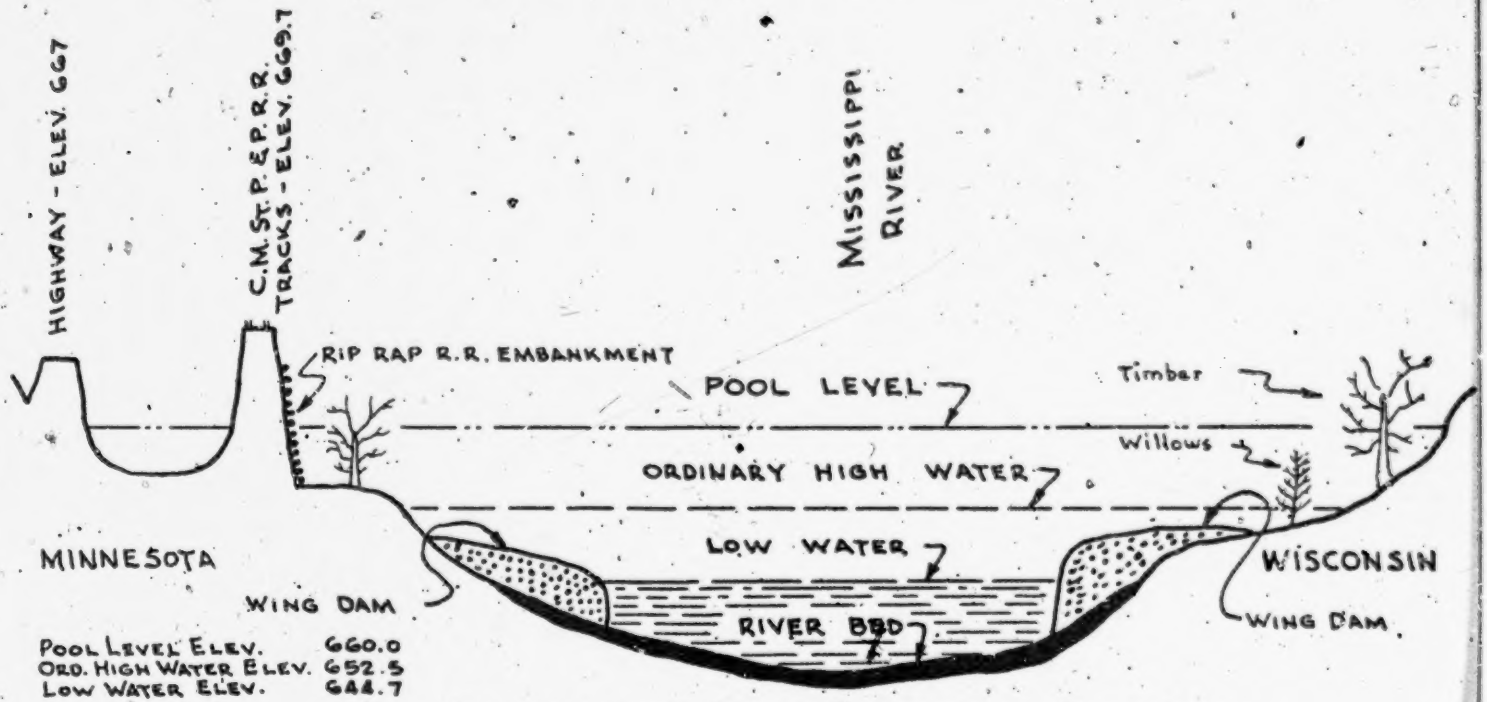
Appendix I—Claimed encroachment area I, Winona County, is adjacent to the Minnesota shore of the Mississippi River. The vertical distances have been exaggerated about ten times over horizontal distances so as to include all of the area on one page.

Appendices II, III—Respectively show claimed encroachment areas II and III in Winona County. The railroad in each of these areas is adjacent to Walters Creek. On each of the illustrations, the channel of the river is such a great distance from the railroad tracks that it was necessary to exaggerate the vertical distances over the horizontal distances respectively thirty and twenty-five times.

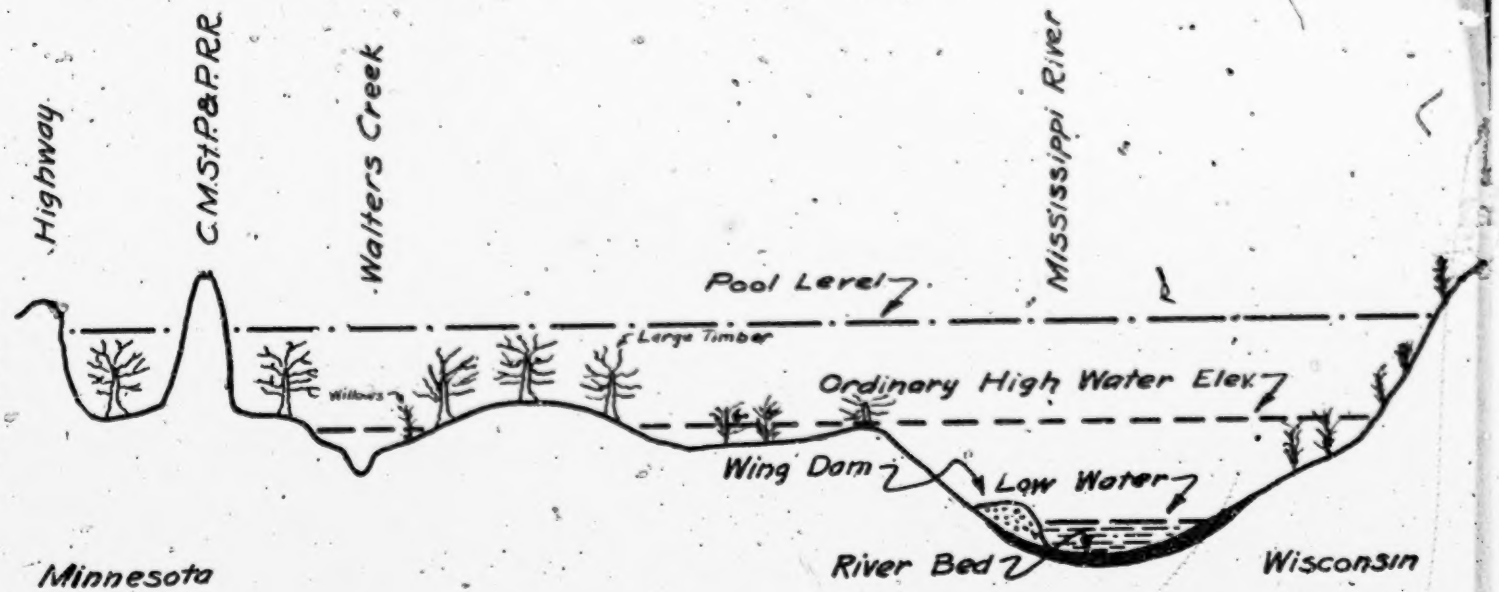
Appendix IV—Illustrates claimed encroachment area in Wabasha County in the Minneiska Station grounds. Here the railroad is also adjacent to the Minnesota shore of the Mississippi River. Vertical distances are exaggerated ten to twelve times over horizontal distances.

Each one of the four cross-sections shows the low and ordinary high water elevations in each area. The approximate distances the wing dams extend out from the railroad embankment, the river bed under the low water channel and the horizontal distance from the railroad tracks to ordinary high water mark, to the river end of the wing dam, to low water mark and to the center of the river are also shown. Each cross-section represents the average condition in each of the areas. They each show a representative wing dam, water surface at low water, at ordinary high water and at normal pool level of 660. Also, they show general location of large timber as well as general location of willows.

APPENDIX I



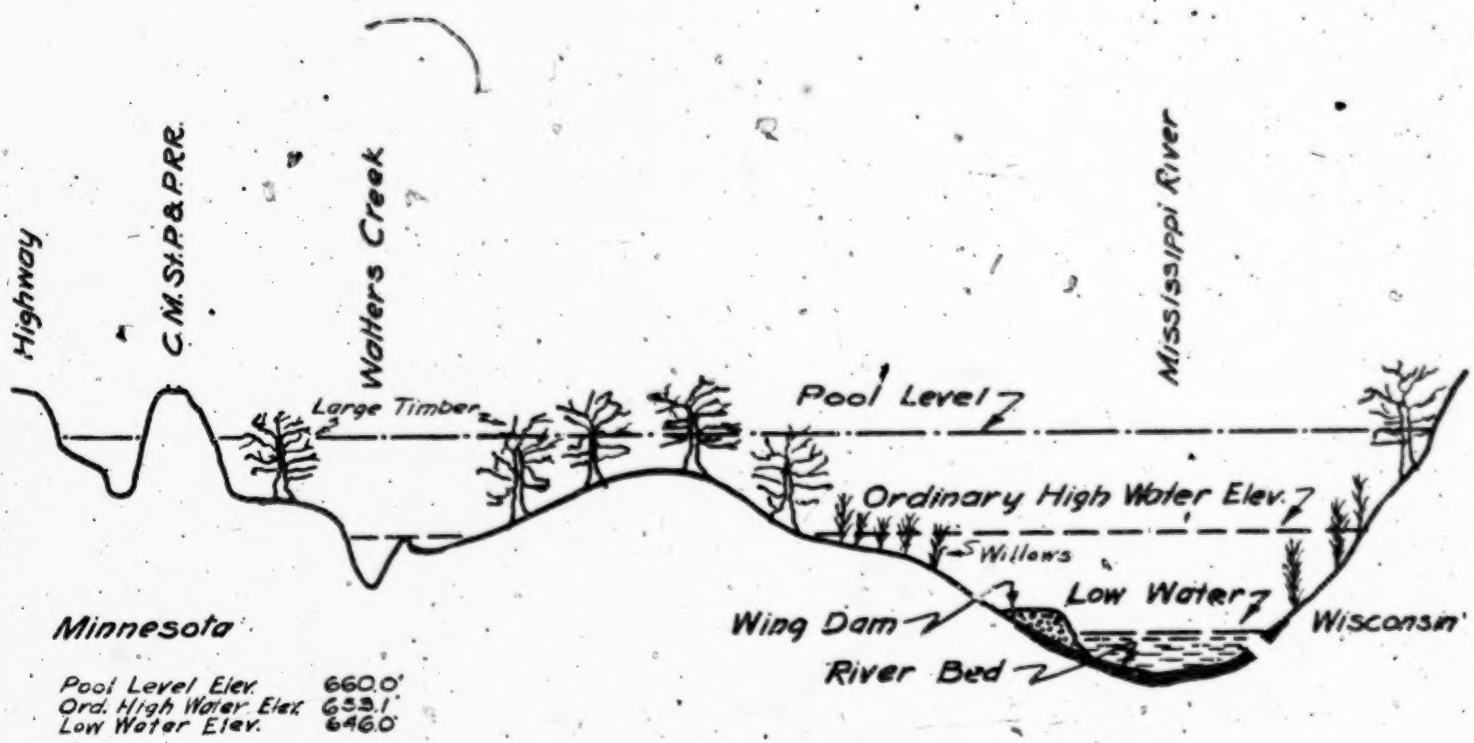
ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA NO. 1 IN WINONA COUNTY



Pool Level Elev.	660.0
Ord. High Water Elev.	652.9
Low Water Elev.	645.2

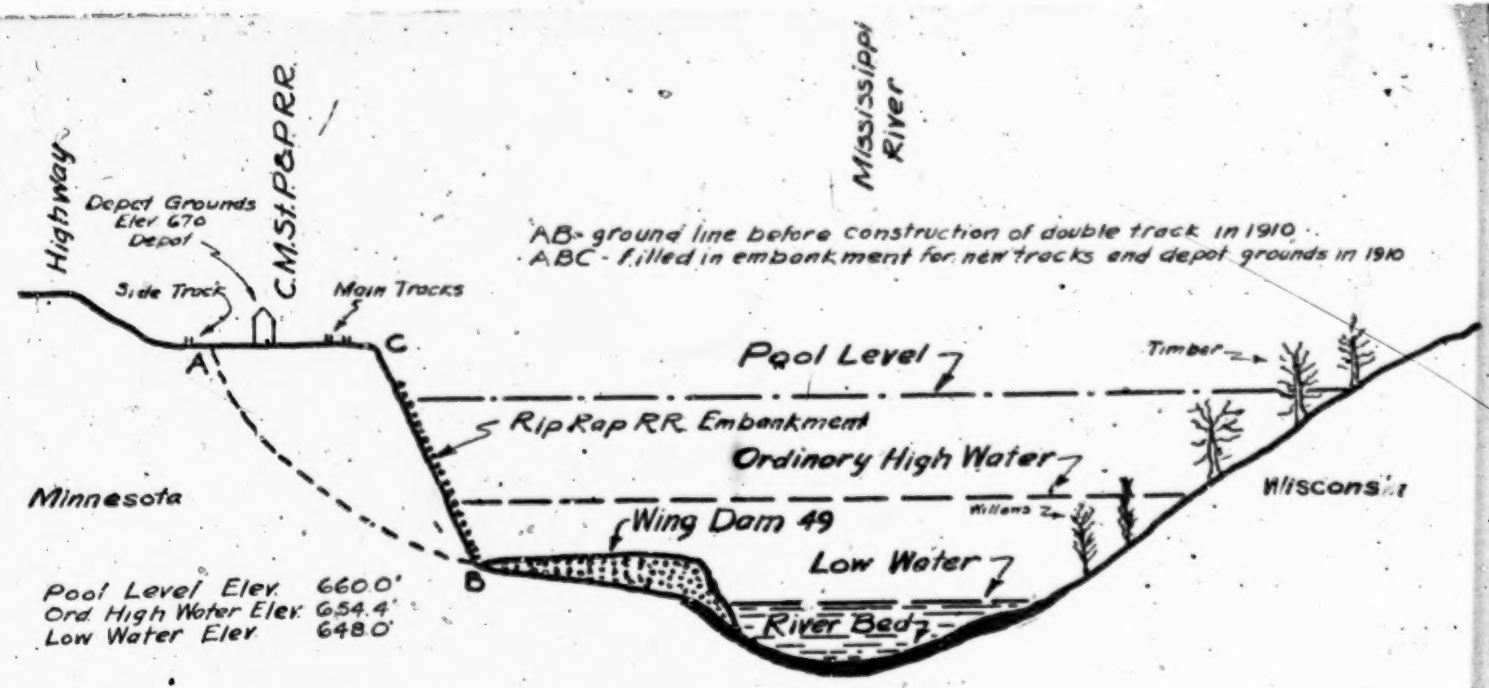
ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No. II IN WINONA COUNTY

0 100' 700' 1400' 2000' 2400'



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No III IN WINONA COUNTY

0 200 1300 2000 2600



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA IN WABASHA COUNTY

0 50' 125' 225' 325'

LOT 2
9.96A
B-51
State of
(State
LOT 8
25.80A
Brush
Meadow
State of Wisconsin
(State Po
LOT 9
44.58A.
Reg. 43.58A.
Bal. 1.00A.
Light-Gordon
(Old Eq Bird
State of Wisc
(State Pa
Mississippi
℄ of Earth Dike
RIVER
Brush & Timber
Sand Bar
Willows
Mud Flat
Fred Hartman
Reg. 33.62A
Bal. 30.37 A
Wi-9
Edwin Schell
Wi-8
Reg. 56.70A
Bal 55.40A
Casper Keller
190A
LOT 1
58.60 A.
LOT 2
37.63 A.
Wi-78
Schell
Bridge Floor Elv. 6096
WATERS CREEK
C.M.St.P.&P.R.R.
Telephone Line
Power Line
Minnesota
Brush & Timber
West 97.0
Gage No 14
Zero = 647.06
Gage No 5
Rock Dam
4910
4920
4930
4940
4950
L-82
T 3
2

State of Wisc. (State Park)

S 40°-09'E -1.

40.00A.
9.98 A.
Reg. 30.02 A.

B-26

Charles A. Kirchner et al

LOT 11
37.80A.
Reg. 4.85A.
Bal. 32.95A.

28 27 34

TOD DIKE

B-10

Charles A. Kirchner et al

LOT 3
43.84A.
9.25A.
Reg. 34.59A.
Bal.

Project

S 40°-45'E -929.9

LOT 9
44.58A.
Reg. 43.58A.
Bal. 1.00A.

Light Cordwood (Oak & Birch)

S 42°-00'E 681.8'

State of Wisconsin

LOT 10
29.50A.
26.80A.
2.70A

S 42°-00'E -1100'

LAKE JOHNSON

B 9
Charles A. Kirchner et al

LOT 2
5.34A.
Reg. 5.53A.
Bal.

33

B 8
660.9T
656.90

B-22

Charles A. Kirchner et al

LOT 1
3.52 A.

Dike

RIVER

B-7

JOHNSON ISL. (ISL. 51)

Reg. 23.95A.

SLOUGH

Willows

Sand Bar

T.B.M.
655.94

GAGE No. 14
ZERO = 647.06

Wi-5
C.M.St.P. & P.R.R.

Wi-4
C.M.St.P. & P.R.R.

Wi-3
C.M.St.P. & P.R.R.

Wi-2A
C.M.St.P. and

CREEK

10'X12' Stone Culv.

108 36" Culvert
Rip Rap

325'

W.S. 650.99
6-25-30

Dept. of Fish & Game House

4950

4960

4970

4980

5000

Power Line

Telephone Line

MON. 1
1091

2B

OD DIKE E

Project Boundary

B-10
Charles A Kirchner et al
LOT 3
S 40°45 E-929.9
43.84 A.
9.25 A.
34.59 A.
Reg
Bal

B-5
State of Wisconsin
(State Park)
LOT 4
Reg 39.80 A.
Bal 21.18 A
18.62 A.

B-4
State of Wisconsin
(State Park)
LOT 6
41.25 A.

Project Boundary

B-2
State of Wisconsin
LOT 5
25.22 A.

(State Park)

Timber
Marsh
Timber
Timber
Timber
Timber
Slough
Slough
Slough
Sand bar
Sand bar
SLOUGH

MON. 3
MON. 10
MON. 1
MON.
TBM
TBM
W.S. 650.99
6-25-30
W.S. 650.67
6-28-30

N32°-10' E

Wi-2A
C.M.St.P. & P.R.R.
and others
Req. 2.65 A.
Land for Site

Wi-1
C.M.St.P. & P.R.R.
and others
Req. 1.30 A.
Land for Site

C.M.St.P. & P.R.R.

Req. 19.05 A.

Req.

B-1

Government N

PORTION OF
RAILROAD EXHIBIT I

0 500 1000

SCALE 1" = 400'

L-82

LOT 1
58.60 A.

Casper Keller
190A

Wi-8
Edwin Schell
Reg. 5G.70A.
Bal. 1.30A.
55.40A

Wi-7B
Edwin Schell
30.63A
R.R 2.20A
Hwy 0.37A
Reg 3.93A
Bal. 27.13A.

Project Boundary

LOT 2
37.63 A.

WALTERS CREEK

Wi-7A
George A. Whitmore et al
7.00A.
Hwy: 0.40A.
Reg. 0.60A.
Bal. 6.00A.

24" con. C. Elv. 673.6

Bridge Floor Elv. 666.

West 97.0

C.M.St.P.&P.R.R.

Highway

4920

4930

4940

4950

4960

Telephone Line

Power Line

1½" C.I. pipe

ROCK DAM

GAGE No. 14 ZERO = 647.06

U.S. Dept. of Agriculture

10x12 Stone 662.2

8'x10' Stone 665.5

120C

120A

State of Minnesota

LOT 3
43.54 A.

L-80

LOT 2
56.55 A.
Reg. 1.85 A.
Bal. 54.70 A.

State of Minnesota

24" Conc Culv.

672.9

665

670

4927+00

4936+00

4948+86.5

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No. III

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No. II

T 108 N. R 29 W. 5th P.M.

L-527

SCALE 1" = 400'

4960 4970 4980 4990 5000

Wi-4 C.M. St.P. &P.R.

Wi-2B C.M. St.P. &P.R.R.

Wi-3 C.M. St.P. &P.R.

Wi-1 C.M. St.P. &P.R.R. and others Req. 1.30 A. Land for Site

LOT 2 56.55 A. Req. 1.85 A. Bal. 54.70 A.

LOT 29.70 A. State of Minnesota

LOT 34.88A Req. 1.10 A. Bal. 33.78 A.

LOT 4 56.00A.

LOT 3 27.00 A. C.M.ST.P.&P.R.R. 13.30 A.

State of Minnesota

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA Nº I

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA Nº II

4968+86.5 4978+86.5 4990+86.5

3" I.P. Bronze Cap Set by U.S.E.O.

Bronze Cap

1" Pipe

Power Line Telephone Line

MON. 1 =1+09.1

MON. 8 0+00

Highway 61

Government M

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENTS

F. W. ROOT,
A. C. ERDALL,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. WHITLOCK,
C. S. JEFFERSON,
Chicago, Ill.,
C. O. NEWCOMB,
Minneapolis, Minn.,
On brief for respondents.

BLANK PAGE

INDEX

	Page
Questions Presented	2
Statement	3
Cross-section and plan in petitioner's brief (App. B) not illustrative of areas involved	4
Undisputed facts	6
Certain misleading and incomplete statements in petitioner's brief should be clarified	9
Argument	11
Offer of proof	11
River shore line of 1910 not necessarily the same in 1934	13
Offer of proof immaterial	13
1. Waterways adjacent to encroachment areas	13
a. Waterway adjacent to claimed encroachment area I in Winona County and claimed encroachment area in Wabasha County a navigable waterway of United States	13
b. Walters Creek (adjacent to claimed encroachment areas II and III in Winona County) not a navigable waterway of the United States	14
2. Respondents concededly riparian owners in segments in question and local law governs as to their title	15
3. In Minnesota, riparian owner owns the fee to low water mark on navigable waterways and has certain other riparian rights out to the navigable channel	16
4. Servitude of private lands to navigation confined to natural widths, levels and flows of the river	17
5. Where property of riparian owner between low and ordinary high water marks does not obstruct or interfere with navigation, compensation may be recovered under Fifth Amendment for property taken by the artificial raising of the water	21
a. Respondent's property did not obstruct navigation	24
b. Railroad embankments are not in the bed of the stream and are not in violation of Sec. 9 and Sec. 10 of the Rivers and Harbors Act of March 3, 1899	26
Cases relied upon by petitioner are not in point	29
Brief summary of some cases relied upon by Government	37
Court properly denied motion of the United States to dismiss from proceeding portions of property claimed to be encroachments in Mississippi River	40
Conclusion	42
As to judgment for lands taken in Winona County	42
As to judgment for lands taken in both Winona and Wabasha Counties	42
Brief Explanation of Illustrative Cross-Sections, Appendices I, II, III, IV	45

Appendix I, illustrative cross-section claimed encroachment area I, Winona County 46
Appendix II, illustrative cross-section claimed encroachment area II, Winona County 47
Appendix III, illustrative cross-section claimed encroachment area III, Winona County 48
Appendix IV, illustrative cross-section claimed encroachment area, Wabasha County 49
Appendix V, Excerpts from House Document No. 290, 71st Congress, 2nd Session 50
Appendix VI, portions of Railroad Exhibit 1 reproduced 52

TABLE OF CASES

Bedford vs. United States, 192 U. S. 217, 225 38
Bradshaw vs Duluth Imperial Mill Co, (1892), 52 Minn. 59 ....16, 17
Brewer-Elliott Oil & Gas Co. vs. United States (1922), 260 U. S. 77 16
Brooks vs. United States (C. C. A. 8), 146 Fed. 223, 229 13
C., St. P., M. & O. Ry. Co. vs. Rorig (C. C. A. 8), 217 Fed. 953 ... 13
Carli vs. Stillwater St. Ry., 28 Minn. 373 16
Carlson vs. St. Louis River Dam & Improvement Co., 73 Minn. 128, 133 21
Davis, et al., vs. Gulf & I. Ry. Co., et al. (C. C. A. 5), 31 F. (2d) 109 15
Dutton vs. Strong & Goodnow, 1 Black 23 .....16, 23
Eaton vs. Boston Ry. (1872), 51 N. H. 505 21
Fox River Paper Co. vs. Rd. Com. of Wis., 274 U. S. 651 16
Gibson vs. U. S., 166 U. S. 269 .....31, 38
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 263, 276 .....31, 32, 33, 38, 39
Hall vs. Hobart (C. C. A. 8), 186 Fed. 426 16
Hanford vs. St. P. & Dul. Rd. Co. (1890), 43 Minn. 104, 111, 118 .....16, 17, 23
Hardin vs. Jordan, 140 U. S. 371 16
Harrison, et al., vs. Fite (C. C. A. 8), 148 Fed. 781, 783, 784, 785 .....13, 15
Heyward vs. United States (1911), 46 Ct. Cls. 484, 52 Ct. Cls. 87 .....21, 23, 43
Hobart vs. Hall, 174 Fed. 433 16
Illinois Central Rd. Co. vs. St. of Illinois, et al., 146 U. S. 387.. 23
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37 (1930) 20, 23, 37
Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26 ..20, 23, 31, 37, 43
Jenkins vs. U. S., 60 Ct. Cls. 23 .....33, 37
Jenkins vs. U. S., 278 U. S. 649 .....34, 37
Kaukauna Wtr. Pwr. Co. vs. Green Bay & M. Canal Co. (1891), 142 U. S. 254 21

Kincaid vs. United States (D. Ct., W. D., La., N. D.), 37 F. (2d) 602, 607 20
King vs. United States (C. C., S. C.) (1893), 59 Fed. 9—Appeals dismissed 164 U. S. 703 ..... 21, 23, 43
Lake Superior Ld. Co. vs. Emerson (1888), 38 Minn. 406 16
Lamprey, et al., vs. State of Minnesota, 52 Minn. 181, 192 16
Lewis Blue Point Oyster Co. vs. Briggs, 229 U. S. 82 37
Lowndes, et al., vs. United States, 105 Fed. 838 ..... 23, 43
Manigault vs. Springs, 199 U. S. 473, 487 38
Miller vs. Mendenhall (1890), 43 Minn. 95 16
Mills vs. U. S., 46 Fed. 738 ..... 31, 36
Monongahela Navigation Co. vs. United States, 148 U. S. 312 ..... 16, 21, 23, 40, 43
Morrill vs. S. A. F. W. P. Co., 26 Minn. 222, 226, 228 16
Mountain Copper Co. vs. United States (C. C. A. 9), 142 Fed. 625 41
Paine Lbr. Co. vs. United States (1893), 55 Fed. 854 ..... 21, 29
Patrick J. Hurley, Secretary of War, vs. Kincaid (1932), 285 U. S. 95, 104—Reversing United States vs. Kincaid (1931), 49 F. (2d) 768 ..... 21, 23, 31
Peabody vs. United States (1915), 231 U. S. 530, 34 S. Ct. 159 .. 21
Petition of Schaller, In re, 193 Minn. 604, 612 29
Philadelphia Co. vs. Stimson, 223 U. S. 605 31
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co. (C. C. A. 8), 59 F. (2d) 902, 912 ..... 16, 21
Pumpelly vs. C., B. & M. Co., 13 Wall. 166 ..... 21, 37
Richards vs. Washington Terminal Co. (1914), 233 U. S. 546, 34 S. Ct. 654 21
Sanguinetti vs. United States, 264 U. S. 146, 149 38
Scranton vs. Wheeler, 179 U. S. 141 31
State vs. Carr (C. C. A. 8), 191 Fed. 257 40
State vs. Korrer (1914), 127 Minn. 60 16
State of Oklahoma vs. State of Texas, 258 U. S. 574, 591 15
Steamer Siren and Cargo, etc., vs. United States, 74 U. S. 152, 165 41
Tempel vs. United States, 248 U. S. 121, 129 34
Thompkins vs. United States (1910), 45 Ct. Cls. 64, 66 21
United States vs. Appalachian Elec. Pwr. Co., ... U. S. ..., 61 S. Ct. 290 ..... 14, 15
United States vs. Barber Lbr. Co. (C. C., Ida., C. D.), 169 Fed. 184, 187, 188 41
United States vs. Chandler-Dunbar Water Power Co., et al., 229 U. S. 53, 33 S. Ct. 667, 673 ..... 33, 39
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134 ..... 17, 23, 37, 39, 43
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170 ..... 20, 23, 37
United States vs. C., B. & Q. Rd. Co., 298 U. S. 682 ..... 17, 23, 37, 43
United States vs. C., B. & Q. Rd. Co., 304 U. S. 714 ..... 23, 37

United States vs. Cress, United States vs. Kelly, 243 U. S. 316, 332 ..... 18, 19, 31, 37, 39, 43
United States vs. Doughton, et al. (C. C. A. 4), 62 F. (2d) 936, 938 15
United States vs. Great Falls Mfg. Co., 112 U. S. 645 ..... 16, 21
United States vs. Heyward, 250 U. S. 633 ..... 21, 23, 43
United States vs. King, 164 U. S. 703 ..... 21, 23, 43
United States vs. Lynah, 188 U. S. 445 ..... 21, 22, 39, 43
United States vs. N. A. T. & T. Co., 253 U. S. 330 34
United States vs. James Stinson, et al., 197 U. S. 200, 207 41
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 853, 854 ..... 19, 23, 24, 37, 39, 43
United States vs. Wheeler Twp. (C. C. A. 8), 66 F. (2d) 977, 984 ..... 20, 23, 39, 43
United States vs. Williams, 188 U. S. 485 ..... 21, 23, 43
Union Bridge Co. vs. U. S., 204 U. S. 364 39
Union Depot Co. vs. Brunswick, 31 Minn. 297, 301, 303 ..... 16, 17
W. A. Ross Construction Co. vs. Yearsley (C. C. A. 8), 103 F. (2d) 589, 592 38
Walker vs. U. S., 139 Fed. 409, 413 40
Weaver vs. Miss. & Rum River Boom Co., 28 Minn. 534, 538 ... 21, 43
West Chicago Rd. vs. Chicago, 201 U. S. 506 ..... 37, 39
Whitaker vs. McBride, 197 U. S. 510, 516 16
Williams, et al., vs. United States (1900), 104 Fed. 50 ..... 21, 23, 43
Willink vs. United States, 240 U. S. 572 ..... 30, 31, 39
Yates vs. City of Milwaukee, 77 U. S. 497, 507 ... 16, 21, 23, 33, 40, 43

STATUTE CITED.

Fifth Amendment to the United States Constitution 21

MISCELLANEOUS CITATIONS

20 C. J., Section 458, at page 1022 41
House Document No. 290, 71st Congress, 2nd Session (App. V) 25, 27, 50
16 Op. A. G. 479 37
16 Op. A. G. 534 37
17 Op. A. G. 109 37
18 Op. A. G. 64 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENTS

The jurisdiction of this Court is invoked to review two final judgments of the United States District Court for the District of Minnesota, First Division, one in the amount of $7,247.21 (R. 87) for flowage easements in property of respondents taken by petitioner in Wabasha County, Minnesota, and the other in the amount of $60,357.67 (R. 82) for similar easements in respondents' property in Winona County (R. 82), together with interest thereon from December 9, 1934 (R. 83 and 87).

The official report of opinion in the Court below (R. 188-198) is reported in 113 F. (2d) 919. The District Court did not write an opinion.

Italics throughout brief are ours.

QUESTIONS PRESENTED

The Trial Court denied the Government's offer to prove the railroad and telegraph lines were constructed between low and ordinary high water elevations of the Mississippi River (R. 146-147).

The Trial Court, at the close of the testimony, denied the motion of the Government to dismiss from the condemnation proceedings the four segments of land here involved (R. 152-155).

The statement of the "Question Presented" in petitioner's brief refers to only one of the questions presented and as to that one, it is clearly insufficient and may be misleading to the Court.

The Circuit Court of Appeals, in its opinion, very clearly sets out the one important question determined by it and which is now before this Court for determination (R. 193).

Are respondents entitled to compensation for measures necessarily taken by them to protect their property against the new water levels created by the petitioner in the construction and operation of Dam No. 5, where it appears all of such protective measures were required and taken solely to protect such property against water levels in excess of ordinary high water elevation (R. 146) where it appears respondents' property does not at present obstruct, interfere with or affect navigation and will not do so after the proposed improvement of navigation and where it further appears two sections of said property are one-quarter to one-half mile distant from the channel of the river with a large area of land higher than ordinary high water elevation intervening (Rd. Ex. 1, R. 95, 179, Appendix VI of this brief), and, where it further appears respondents' said two sections of property are located on a tributary (Walters

Creek) of the river and where it further appears, by stipulation, petitioner was permitted to prove the fact as to whether Walters Creek was or was not a navigable waterway of the United States (R. 145), but failed to offer any proof that same was such navigable waterway and where it further appears respondents were not permitted to have the bill of exceptions include a complete record on this appeal (R. 170, 176).

Was the offer to prove respondents' structures were constructed on land between low and ordinary high water elevations restricted to the conditions existing when the railroad was double-tracked in 1910, or, did it also include conditions existing in 1934 at the time when petitioner, by order of Court, took immediate possession of the flowage easement in said property?

Was the motion to dismiss from this proceeding the four segments of property here involved timely? (R. 152-155.)

STATEMENT

The statement contained in the petitioner's brief fails to include many facts essential to a proper understanding and determination of the questions before the Court. We will call attention to some of these important omitted facts.

The railroad has existed along the river since about 1870. It is now a double-track railroad and is the main line between Chicago, Milwaukee, St. Paul, Minneapolis and the Pacific Northwest. It is a busy stretch of railroad (R. 115), there being a large number of freight, passenger and mail trains operated thereover (R. 99). The telegraph and telephone lines are important main trunk lines of the Railroad and Telegraph Companies (R. 115).

The 26 dams constructed across the river and bottom lands

in the Upper Mississippi River permit slack-water navigation. That means the Mississippi River, instead of flowing as a stream, is flowing through a series of lakes (R. 113). Lock and Dam No. 5, near Minneiska, raises the natural water levels in the segments of the railroad here involved from 12 to 15 feet above low water elevation (R. 109, Rd. Ex. 2) and 5.6 to 7.5 feet above ordinary high water elevation (R. 140, 132).

Cross-Section and Plan in Petitioner's Brief (Appendix B) Is Not Illustrative of Areas Involved.

The cross-section sketch appearing on page 27 of the petitioner's brief not only is not typical but does not remotely indicate the true situation at any of the claimed encroachment areas in either Winona or Wabasha Counties (Rd. Ex. 1, R. 97, 179, Appendix VI). Therefore, respondents have reproduced herein as Appendix I, II, III and IV an illustrative cross-section in each of the four claimed encroachment areas, each of which was reproduced in the briefs in the Circuit Court of Appeals. Appendix VI is a portion of Railroad Exhibit 1 showing in black and white the three claimed encroachment areas in Winona County. Railroad Exhibit 1, on a reduced scale (R. 179), shows in blue, land which is flooded by the pool at elevation 660 (R. 97). A detailed explanation of this map appears in the record (R. 97-99).

Claimed encroachment areas III and II in Winona County are adjacent to Walters Creek. The end of Wing Dam 33, opposite area III and of Wing Dams 35, 36 and 37, opposite area II, are from 1,300 to 2,750 feet distant from the tracks. The navigable channel commences at the more distant end of these wing dams (Rd. Ex. 1, R. 179, Appendix VI). Land be-

tween wing dams and railroad is covered with "Brush and Timber" (Rd. Ex. 1, R. 179, Appendix VI). Spot elevations show land above ordinary high water elevation distant from the railroad tracks as much as 1,250 feet in area III and as much as 600 to 1,700 feet in area II. Spot elevations above low water are shown still farther away from the railroad (Rd. Ex. 1, R. 179, Appendix II, III and VI). In claimed encroachment area I, the near end of Wing Dam 108 is about 100 feet and the river end about 225 feet from the track. Scaling indicates upland extends out from the track for a distance of 50 to 110 feet throughout this claimed encroachment area. Wing Dam 107, near the western edge of this claimed encroachment area, extends about 450 feet out from the track (Appendix VI). The purpose of the wing dams, as testified to by the various witnesses, was to keep the channel away from the shore (R. 96) and to keep a deep channel (R. 110, 113). Anything that will restrict the channel between the ends of the wing dams would be helpful to navigation (R. 113).

During the trial, the parties entered into stipulation which, among other things, provided that said stipulation "shall not deprive either of the parties herein from herein proving or disproving the waterway along the claimed encroachments are or are not in fact navigable waterways of the United States" (R. 145). The Government, in its petition and in accordance with the order for immediate possession on August 4, 1934, took respondents' property in Winona and Wabasha Counties (R. 23-31) including the claimed encroachment areas, but did not submit any proof to show whether or not Walters Creek adjacent to areas II and III was or was not a navigable waterway of the United States. The Government did not claim that any structure of respondents' here involved obstructed navigation in the river (R.

137). The Government did not offer to prove any part of the railroad was below ordinary high water mark when the condemnation proceedings were commenced or when immediate possession of the respondents' property was granted. The rejected offer to prove related to a condition claimed to exist in 1909 or 1910 (R. 146, 151).

Undisputed Facts.

1. The District Engineer of the respondent Railroad in December, 1909, wrote to Major Riche, United States District Engineer in charge of this portion of the Mississippi River, stating the Railroad intended to double-track and to make certain changes in its alignment at points shown in red on the map (U. S. Ex. 70, R. 149) and also requesting permission to proceed with the work (R. 147-149). On Exhibit 70, the vertical figure 4800 is a railroad station in the claimed encroachment area in Wabasha County. Railroad Station 4930 was in claimed encroachment area III in Winona County and Railroad Stations 4950 and 4960 were in claimed encroachment area II in said county. That exhibit made on November 9, 1909, shows areas II and III were in "Low marshy land." Stations 4980 and 4990 are in claimed encroachment area I (R. 149). Major Riche, in answer, advised that in the proposed new line he found nothing "prejudicial to the interests of navigation or in any way interfering with the proposed Government improvement of the river" (R. 151).

2. The railroad was made into a double-track railroad and the alignment changed in 1910 (R. 142).

3. The four claimed encroachment areas are shown in the stipulation of the parties (R. 121 and 125) and the three located in Winona County are shown on a larger scale in

the portion of Railroad Exhibit 1 hereto attached as Appendix VI. The condemnation proceedings included the claimed encroachment areas (R. 6, 9, 13, 15, 16, 17).

4. The testimony was undisputed that the Railroad and Telegraph Companies' embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand water and ice action under natural conditions of the Mississippi River and its tributaries (R. 116).

5. Respondents have not stipulated or conceded that any portion of their property in Winona County was located on land below ordinary high water elevation of the river when the railroad was double-tracked, the proceedings herein were commenced or possession of their property taken by the Government (R. 118-120). Such a concession was made in Wabasha County (R. 123).

6. In the summarized statement it is conceded "competent and sufficient evidence was introduced by the Railroad Company and the Government to support and sustain the verdict as to the need for protecting the property of the Railroad and Telegraph Companies under the new changed conditions and to sustain the verdict as to the amount thereof as to each item of damage claimed by and allowed to the Railroad and Telegraph Companies by the jury" (R. 118).

7. The summarized statement concedes "the character, amount and necessity for the measures taken to protect the Railroad and Telegraph Companies from the waters raised and impounded by Lock and Dam No. 5 and the reasonable cost of such protective measures is not at issue on this appeal by reason of the stipulation of the parties. * * * For that reason, the voluminous testimony showing the ac-

tual protective measures taken and the cost thereof has been omitted in this Bill of Exceptions" (R. 118).

8. The petitioner conceded the structures of the Railroad and Telegraph Companies in each of the claimed encroachment areas were located on land which was at an elevation above the low water (R. 144) but offered to prove the structures were constructed between low and ordinary high water mark elevations of the river (R. 143, 146).

9. It was conceded by the Government's attorneys that the 660 pool will raise the river water level six or eight feet above the elevation claimed by the Government to be the ordinary high water mark of the river (R. 132-133). The proof showed it would be 5.6 feet to 7.5 feet in the claimed encroachment areas (R. 140).

10. The Government conceded no damage would occur to the Railroad and Telegraph Companies unless the Government artificially raised the water level of the Mississippi River to a point higher than ordinary high water mark (R. 132-133, 142-143), and "that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark" (R. 146).

11. "The Railroad Company is the riparian owner in the segments involved in this appeal" (R. 145).

12. It was conceded by counsel for the Government that the construction of the railroad between low water mark and ordinary high water mark did not actually interfere with navigation but it was claimed same became a financial obstruction if the Government had to pay compensation for the cost of protecting same against waters raised by the Government's lock and dam (R. 135-137).

13. The record shows that all lands shown in blue on Railroad Exhibit 1 (R. 179) were covered with timber. The trees ranged from 48 inches in diameter down to brush (R. 98).

14. Immediate possession of the easement in respondents' property including the portion in the four claimed encroachment areas was taken by the Government on August 4, 1934 (R. 25-31, 6, 13).

Certain Misleading and Incomplete Statements in Petitioner's Brief Should Be Clarified.

On pages 3 and 4 of petitioner's brief, it is stated in substance that by reason of the removal "of the timber and underbrush in the margins of the river and in the area to be flooded" the railroad "embankment was thereby exposed to greater wind, wave and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment" (R. 116). This is only a part of the picture. In the agreed summarized statement of facts, it is stated:

> "The testimony was undisputed. The Railroad and Telegraph embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand river and ice action under natural conditions of the Mississippi River and its tributaries.
>
> "The testimony of each of said witnesses was that as to the portions of the Railroad and Telegraph properties included in this appeal, certain protective measures had to be taken in order that such properties could continue to be operated in the same safe and efficient manner *after the raising of the water to pool level* as they were operated under natural conditions of the Mississippi River. * * *

"All of the witnesses testified that the impounding of the river water upstream from Dam No. 5 to the normal pool level would cause water, and, in the winter, ice, to strike the railroad embankments at a much higher elevation than under natural ordinary stages and flows of the Mississippi River. That the railroad embankments because thereof would be saturated at least up to the pool level and needed riprap (rock) protection to stabilize the embankments so as to safely carry the heavy engines and trains operating on the railroad. That riprap was required to protect the railroad embankments from wave action on the new pool level and also to protect such embankments from ice movement on the pool caused by expansion and contraction in the winter and from movement of ice floes on the spring breakup caused by wind and current.

"They all testified that embankment protection (rock riprap) was required upon the railroad embankments at the locations where it was in fact placed and proposed by the Railroad in the areas covered by this appeal. The only dispute concerned the quantity of and elevation to which such riprap should be carried above normal pool elevation."

On page 4 of the brief, it is stated the Railroad, in double-tracking its railroad placed "portions of their embankment across the bends in the Mississippi * * *." This is both misleading and incorrect. In claimed encroachment areas II and III, the river bends away from the railroad and is located from 1,300 feet to 2,700 feet distant from the railroad tracks. A comparison of this actual situation with the cross-section shown on page 27 of the petitioner's brief clearly shows that both the statement and cross-section give an improper picture of the true situation (U. S. Ex. 70, R. 149, Ex. "A," R. 125, 121, Rd. Ex. 1, R. 97, 179, and Appendix VI).

On page 5 of the petitioner's brief, it is stated the Appellate Court held the additional flooding of respondents' property was a compensable taking even though the damaged structures were located in the bed of the stream (R. 188-198). Concededly, all of respondents' structures were located on ground with an elevation above low water mark (R. 146, 67). It should be kept in mind the Circuit Court of Appeals, in using the language similar to that just referred to, was referring to the bed of the stream as including all of the portions of the low lands which were below ordinary high water mark elevation, even though such low lands with timber, grass, brush and willows growing thereon, extended for hundreds and, in some instances, thousands of feet on each side of the main stream of the Mississippi River (Appendix VI).

ARGUMENT

The Offer of Proof.

The Government offered to prove that three segments of respondents' property in Winona County and one segment in Wabasha County, each segment at times being referred to as an encroachment area, "are constructed on land which is located below ordinary high water mark and above low water mark. * * * The Government concedes the embankments were constructed above low water mark" (R. 146, 67).

Respondents objected to the offer of proof upon the ground, among others, "that the fact which the Government proposes to prove is immaterial" (R. 147) and that the waterway adjacent to claimed encroachment areas II and III (Walters Creek) is not a navigable waterway of the United States (R. 147). The Court sustained the objection to the offer of proof (R. 147, 67).

The exhibits under discussion in connection with said offer of proof related to conditions existing in 1909 prior to the double-tracking in 1910 (see Gov. Exs. 69, 70, 71, R. 147-151) (Rd. Ex. 2, Gov. Ex. 9, as to location of original ground line prior to 1910, R. 102, 141).

As to the segment of land in Wabasha County, after the trial, by stipulation, respondents conceded their railroad embankment not only in 1910 but also when the petition for condemnation was filed in 1933 was located on land between low and ordinary high water elevations of the river (R. 123, 14).

However, the Circuit Court of Appeals, in its opinion, stated:

> "For the purposes of this opinion, we shall assume that the 'encroachment areas' are all upon lands lying below ordinary high water mark and above low water mark" (R. 191).

The three claimed encroachment areas in Winona County are indicated on the portion of Railroad Exhibit 1 attached hereto as Appendix VI. The waterway immediately adjacent to and riverward from the so-called encroachment areas II and III, designated "Walters Creek," it is asserted by respondents, was not a navigable waterway of the United States, and the offer of proof was objected to on that ground (R. 147). In the stipulation of the parties made at the time of the Government's offer of proof, it was agreed that the stipulation should not deprive either of the parties from proving or disproving the waterways along the claimed encroachments are or are not in fact navigable waterways of the United States (R. 145). Most of respondents' evidence showing this fact was excluded from the record on appeal to the Circuit Court of Appeals by the United States District

Judge who passed upon the record after the death of the Trial Judge (His Honor, Judge Molyneaux) upon the ground such record was immaterial on this appeal.

The River Shore Line of 1910 Not Necessarily the Same in 1934.

Even if it be a fact that the Railroad constructed its new alignment in 1910 between low and ordinary high water elevations, such fact is no evidence that in 1934, when immediate possession was taken by the Government, the shore line of the Mississippi River had continued to be the same.[1]

In fact constant changes are taking place in the Mississippi River shore lines.[2]

The Offer of Proof Was Immaterial.

Many cogent reasons exist for sustaining the holding of the Trial Court that the offer of proof was immaterial (R. 145-147). The same reasons indicate the respondents are entitled to receive compensation from the Government for the flowage easements taken in the property here involved, even though it be assumed (contrary to the fact in Winona County) the railroad, when immediate possession of same was taken by the Government, was located between low and ordinary high water elevations.

1. Waterways adjacent to encroachment areas.

(a) The waterway (Mississippi River) adjacent to claimed encroachment area No. I in Winona County and

---

[1]Brooks vs. United States (C. C. A. 8), 146 Fed. 223, 229.
C., St. P., M. & O. R. Co. vs. Rorig (C. C. A. 8), 217 Fed. 953.

[2]Harrison, et al., vs. Fite (C. C. A. 8), 148 Fed. 781, 785.

adjacent to the claimed encroachment area in Wabasha County is a navigable waterway of the United States (Rd. Ex. 1, R. 179, Appendix I, IV and V);

(b) Walters Creek was not a navigable waterway of the United States.

While the Court excluded photographs and cross-sections and other exhibits which graphically showed Walters Creek was not a navigable waterway of the United States upon the ground such proof was immaterial on this appeal (R. 170, 175), nevertheless, there still remains in the record considerable proof which indicates rather clearly that the waterway (Walters Creek) adjacent to claimed encroachment areas II and III "is not a navigable waterway of the United States" (Rd. Ex. 1, R. 97, 179, Appendix II, III and VI).

At the trial, the Government was by stipulation permitted to offer any proof it might have that Walters Creek was a navigable waterway of the United States (R. 145). Respondents' objection to the Government's offer of proof (Assignment of Error 12) asserted, as one of its grounds, the waterway along claimed encroachment areas II and III was "not a navigable waterway of the United States" and "not a waterway in which there is any practical possibility of its being used as a highway for interstate or foreign commerce" (R. 147).

As stated by this Court in the recent case of *United States vs. Appalachian Electric Power Co.* (Dec. 16, 1940), ... U. S. ...., 61 S. Ct. 290:

> "A waterway *otherwise suitable for navigation* is not barred from that classification merely because artificial aids must make the highway *suitable for use before* commercial navigation may be undertaken" (p. 299).

"In determining the navigable character of the New River, it is proper to consider the *feasibility of interstate use after reasonable improvements* which might be made" (p. 300).

As indicated on Railroad Exhibit 1, Walters Creek decreases in size as one goes upstream, passing under the railroad at Bridge L-82 (R. 179). A mere glance at that exhibit shows the creek adjacent to claimed encroachment areas II and III is not now and cannot be made suitable for commercial or interstate navigation and this would be true if the waterway were improved by dredging and the removal of Wing Dam No 101. There are no nearby persons to make shipments and no commodities to be shipped.

The Government did not prove or offer to prove this waterway was a navigable waterway of the United States. It did not prove any past or prospective commerce, or that boats had or could enter or use this waterway, or that any habitation, industry, building or commodity for shipment existed along this waterway (Appendix VI).

Such a waterway is not a navigable waterway of the United States.[3]

2. The title of respondents as riparian owners in segments in question depends on local law.

Respondents are concededly riparian owners in the segments in question (R. 145).

---

[3] **Harrison vs. Fite** (C. C. A. 8), 148 Fed. 781, 783, 784.
United States vs. Doughton, et al. (C. C. A. 4), 62 F. (2d) 936, 938.
State of Oklahoma vs. State of Texas, 258 U. S. 574, 591.
United States vs. Appalachian Elec. Pwr. Co., ...U. S....., 61 S. Ct. 290.
Davis, et al., vs. Gulf & I. Ry. Co., et al. (C. C. A. 5), 31 F. (2d) 109.

"The question of the title of riparian owner is one of local law."[4]

3. In Minnesota, the riparian owner holds the fee to low water mark on a navigable waterway.[5]

He also holds the *"jus privatum"* in the bed subject only to the *"jus publicum"* in the State,[6] and has certain riparian rights out to the navigable channel which cannot be taken even by the State without just compensation.[7] He has the right if public interests are not prejudiced thereby to reclaim submerged lands and ~~it is to~~ the interests of the State

---

[4] Whitaker vs. McBride, 197 U. S. 510, 516.
Hamlin vs. Jordan, 140 U. S. 371.
Brewer-Elliott Oil & G. Co. vs. U. S. (1922), 260 U. S. 77.
Fox River Paper Co. vs. Rd. Com. of Wis., 274 U. S. 651.
Lamprey, et al., vs. State of Minn., 52 Minn. 181, 192.
Morrill vs. S. A. F. W. P. Co., 26 Minn. 222, 226, 228.

[5] Lake Superior Land Co. vs. Emerson (1888), 38 Minn. 406.
Hanford vs. St. P. & D. Rd. Co. (1890), 43 Minn. 104, 111.
Miller vs. Mendenhall (1890), 43 Minn. 95.

[6] State vs. Korrer (1914), 127 Minn. 60.
Bradshaw vs. Duluth Imperial Mill Co. (1892), 52 Minn. 59.
Hanford vs. St. P. & Dul. Rd. Co., supra.
Hobart vs. Hall, 174 Fed. 433.
Hall vs. Hobart (C. C. A. 8), 186 Fed. 426.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co. (C. C. A. 8), 99 F. (2d) 902, 912.

[7] Union Depot Co. vs. Brunswick, 31 Minn. 297, 301.
Carli vs. Stillwater St. Ry., 28 Minn. 373.
Miller vs. Mendenhall, 43 Minn. 95.
Lamprey, et al., vs. State of Minn., 52 Minn. 181, 192.
Lake Superior Land Co. vs. Emerson, 38 Minn. 406.
State vs. Korrer, 127 Minn. 60.
Hanford vs. St. P. & D. Rd. Co., supra, at p. 118.
Yates vs. City of Milwaukee, 77 U. S. 497, 507.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Dutton vs. Strong & Goodnow, 1 Black 23.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, page 912.

that such waste lands be reclaimed.[8] A presumption exists that he did not reclaim beyond the point of navigability. See *Union Depot Co. vs. Brunswick, supra,* at page 303. As therein stated, "the usual and often the only practical way on the Mississippi and its tributaries (is) by reclaiming the land by artificial filling in with earth out to the requisite depth of water."

4. "The servitude of private lands to navigation is confined to the natural widths, levels and flows of the river." If more is taken, the Government must compensate the owner for such taking.

All of the compensation awarded to the respondents herein was awarded to compensate them for damages caused by the artificial changing and raising of the levels of the Mississippi River and its tributaries permanently. All of the damages herein involved concededly are caused solely by the natural levels of the river being raised by Lock and Dam No. 5 above ordinary high water mark (R. 146, 132, 133, 142-143).

The water levels are raised by the dam in each of the four claimed encroachment areas 15.3 feet, 14.8 feet, 14 feet, and 12 feet above low water (Rd. Ex. 2 and Appendix I, II, III, IV) and 7.5 feet, 7.1 feet, 6.9 feet and 5.6 feet respectively above ordinary high water elevation (R. 140, Rd. Ex. 2 and Appendix I, II, III and IV).

In *United States vs. C., B. & Q. Rd. Co.* (C. C. A. 8), 82 F. (2d). 131 (Writ of Certiorari denied, *U. S. vs. C., B. & Q. Rd. Co.,* 298 U. S. 689), at page 134, it is said:

---

[8] Hanford vs. St. P. & Dul. Rd. Co., supra, page 118;
Union Depot Co. vs. Brunswick, supra.
Bradshaw vs. Duluth Imperial Mill Co., 52 Minn. 59.

> "As a foreword, it may be premised that, if well-nigh the unanimous voice of *stare decisis* shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi, even though a navigable stream, and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of the appellee) beyond that provided by nature, could be obtained by appellant only by the exercise of the sovereign right of eminent domain, and the payment to appellee of just compensation for the damages by it sustained."

A leading case is *United States vs. Cress, United States vs. Kelly,* 243 U. S. 316. In those cases, certain locks and dams backed up water into White Oak and Miller Creeks. The Trial Court failed to find whether White Oak Creek was or was not navigable. This Court, in said cases, discusses the rights of States and the authority of Congress as to navigable streams. On page 319, this Court said:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks * * * *subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations,* * * * *the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation. (Monongahela Navigation Co. vs. U. S.,* 148 U. S. 312, 336; *U. S. vs. Lynah,* 188 U. S. 445, 465, 471.)"

On page 321, the Court says:

"* * * *riparian owners have a right to the enjoyment of the natural flow without burden of hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right* (citing cases in note)."

On page 326, the Court further said:

"But the authority to make such improvements (raising WATER LEVELS BY dams, etc.) is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, *must be exercised, when private property is taken, in subordination to the Fifth Amendment. Monongahela Navigation Co. vs. United States,* 148 U. S. 312, 336; *United States vs. Lynah,* 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

The Railroad and Telegraph Companies, in building their railroad and telegraph lines *"had a right to rely upon the history of the height to which the water had risen at various flood periods and its natural height in determining the elevation to which it was to be constructed."* If the elevation of the water is raised beyond its natural stage by artificial means and a flowage easement established, as in the instant case, it would seem that the owner of the land affected must be justly compensated for the damages thus sustained."

See *United States vs. Wabasha-Nelson Bridge Co.* (C. C. A. 7), 83 F. (2d) 852, 854.

The public easement of navigation on the river fluctuates, ordinarily being low in the winter and summer, higher in the fall and highest in the spring. The Government has no right to continuously maintain the water levels at the spring or fall levels. When the flow of the water in the river provided by nature is at a low level, the servitude of public navigation must necessarily be at the same low level.

In the instant case, the Government has taken from respondents the right to maintain their railroad and telephone and telegraph lines at the natural levels of the river. They had and exercised this right prior to the commencement of the condemnation proceedings here involved.

See *United United vs. Wheeler Township* (C. C. A. 8), 66 F. (2d) 977, 984.

We submit the foregoing decisions demonstrate in the instant case: (1) that the public easement of navigation is limited to the natural widths, levels and flows of the river, (2) that the respondents are entitled to the continuous maintenance of the levels, widths and flows provided by nature in Walters Creek and in the Mississippi River, and (3) that all property of the respondents which was adequately protected against and, therefore, not affected by the natural levels, widths and flows of Walters Creek and the Mississippi River was private property and to the extent that such property is affected by the alteration in the natural flows and the raising of the natural levels by Dam No. 5, compensation must be made to respondents. See also cases cited below.[9]

---

[9]See **Kincaid vs. United States** (D. Ct., W. D., La., N. D.), 37 F. (2d) 602, 607.

Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37 (1930).

Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26.

United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.

5. This Court has definitely held where property of a riparian owner is located between low and ordinary high water elevations of a navigable river and same does not obstruct or interfere with navigation on the river, the owner of such property may recover compensation from the Government for a partial taking of such property caused by raising the water levels above natural levels.

So far as here material, the Fifth Amendment to the United States Constitution provides:

> "No person shall be * * * deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation."

In *United States vs. Lynah*, 188 U. S. 445, the principal

United States vs. Lynah, 188 U. S. 445.
Yates vs. City of Milwaukee, supra.
Pumpelly vs. C., B. & M. Co., 13 Wall. 166.
Eaton vs. Boston Ry. (1872), 51 N. H. 505.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Kaukauna Wtr. Pwr. Co. vs. Green Bay & M. Canal Co. (1891), 142 U. S. 254.
Monongahela Navigation Co. vs. United States, supra.
Paine Lbr. Co. vs. U. S. (1893), 55 Fed. 854.
King vs. United States (C. C., D. S. C.) (1893), 59 Fed. 9—Appeals dismissed, 164 U. S. 703.
Williams vs. U. S. (1900), 104 Fed. 50—Affirmed in United States vs. Williams, 188 U. S. 485.
Thompkins vs. United States (1910), 45 Ct. Cls. 64, 66.
Heyward vs. United States (1911), 46 Ct. Cls. 484, 52 Ct. Cls. 87—Affirmed in United States vs. Heyward, 250 U. S. 633.
Peabody vs. United States (1913), 231 U. S. 530, 34 S. Ct. 159.
Richards vs. Washington Terminal Co. (1914), 233 U. S. 546, 34 S. Ct. 654.
Patrick J. Hurley, Secretary of War, vs. Kincaid (1932), 285 U. S. 95—Reversing United States vs. Kincaid (1931), 49 F. (2d) 768.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, p. 912.
Weaver vs. Mississippi & Rum River Boom Co., 28 Minn. 534, 538.
Carlson vs. St. Louis River Dam & Improvement Co., 73 Minn. 128, 133.

question involved was whether or not the artificial raising of the water levels of a navigable river, so as to destroy Lynah's rice plantation located between low and ordinary high water marks of the Savannah River, constituted a taking of Lynah's property where such water levels were raised in aid of navigation under the commerce clause of the Federal Constitution. On page 468, this Court said:

> "Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate title. * * *
>
> "Some question is made as to the meaning of the findings. *It appears* from the 5th finding, as amended, *that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other;* that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. * * * both by seepage and percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the Government has undertaken. Does this amount to a taking?"

On page 474, the Court said:

> "Following the settled law of this Court, we hold that there has been a taking of the lands for public

uses, and that the Government is under an implied contract to make just compensation therefor."

The Lynah case is in accord with earlier decisions and has been followed in a number of decisions.[10]

In *United States vs. Wabasha-Nelson Bridge Co.* (C. C. A. 7), 83 F. (2d) 852, a roadway embankment was located in the bottom lands upstream from Mississippi River Dam No. 4. Portions of same were below ordinary high water mark. Dam No. 4 only raised the water levels from 1 to 2 feet above ordinary high water mark at the point in question, whereas in the instant case, Dam No. 5 in the areas involved raised the water levels from 5.6 to 7.5 feet above ordinary high water elevation (R. 132, 140). Judgment awarding compensation for taking a flowage easement in the road-

---

[10] Williams, et al., vs. United States (1900), 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9—Appeal from this decision dismissed by United States Supreme Court in United States vs. King, 164 U. S. 703.
Lowndes vs. United States, 105 Fed. 838.
Heyward vs. United States, 46 Ct. Cls. 484.
United States vs. Heyward, 250 U. S. 633.
Illinois Central Rd. Co. vs. St. of Illinois, et al., 146 U. S. 387.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Dutton vs. Strong & Goodnow, 1 Black 23.
Hanford vs. St. P. & Dul. Rd. Co., 43 Minn. 104, 118.
Jacobs vs. United States, 290 U. S. 13.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ of Cert. denied in United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Hurley vs. Kincaid, 285 U. S. 95, 104.

way embankment was affirmed. At page 853, the Court said:

> "It was also determined that an ordinary high water stage would not exceed an elevation of 665 or 666 feet; thus leaving a vertical spread of 10 to 11 feet at the time of an ordinary high water. The natural flow of the water at such times would contact the embankment at this elevation, but would fluctuate and not remain the same at all times. During many months of the year the water level would, of course, be much lower than that elevation. Because of the different elevations of the land adjacent to appellee's right of way, the water, at an elevation of 667 feet, the flowage easement of the government, does not contact the embankment of the roadway throughout its entire length. It will, however, contact it at various places and will tend to cause the water in the borrow pits throughout its entire length to be elevated. At the places where direct contact is had, or where the land of appellee is directly invaded, the water will remain at a level of at least one foot higher upon the embankment than it would if the dam had not been constructed and the flowage easement established. It is clear, therefore, that such easement does encroach upon the property of appellee."

(a) Respondents' Property for Which Compensation Was Herein Granted Did Not Obstruct Navigation.

At low water stages, the entire railroad embankment in each of the four claimed encroachment areas rests upon dry land. Such condition exists for many months each year. There are wing dams riverward from the railroad in each area (Rd. Ex. 1, R. 179, Appendix VI). "The purpose (of these wing dams) is to keep the channel away from the shore" (R. 96). "Anything that would restrict the channel between the ends of the wing dam would be helpful to naviga-

tion" (R. 113). In the encroachment area in Wabasha County, the Government constructed Wing Dam No. 48 and Wing Dam No. 49 (Rd. Ex. 1, R., 97, 179). In Winona County, it has constructed Wing Dam No. 33 in area III, Wing Dams 35, 36 and 37 in area II, and Wing Dams 107 and 108 in area I (Appendix VI). In areas II and III, the nearest edge of the channel of the river varies from 1,300 to 2,100 feet at right angles from the railroad with timber, willows and brush on the intervening land (Appendix VI).

As shown by House Document No. 290, 71st Congress, 2nd Session:

> "These dams (including Dam No. 5) would provide a nine-foot depth in the section of the river canalized."

Counsel for the Government did not claim any of the respondents' structures would obstruct navigation (R. 135, 137). Their sole claim was if required to pay for taking such structures, same would constitute a financial burden (R. 135, 137). The Circuit Court of Appeals found the railroad embankment was not an obstruction to navigation stating the "embankment does not interfere with or obstruct navigation" (R. 193).

The Circuit Court of Appeals, in its opinion, further very aptly said:

> "Since the embankment and structures of the appellees are not claimed to be, and are not, obstructions to navigation, and have not been determined by Congress to be such obstructions, we think that, under the rule announced in the Lynah and Cress cases, the flooding of appellees' property, here involved, above ordinary high water mark was a taking of their property, for which they were entitled to compensation" (R. 197-198).

(b) The Railroad Embankments Are Not in the Bed of the Stream and Are Not in Violation of Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899.

Appendix A on pages 25 and 26 of petitioner's brief sets out Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, Ch. 425, 30 Stat. 1121, 1151 (33 U. S. C., Secs. 401, 403).

Apparently petitioner is of the view that the railroad embankments paralleling the Mississippi River and Walters Creek and the structures extending through and located upon such embankments are in violation of said Sections 9 and 10.

The material portion of Section 9 is as follows:

> "That it shall not be lawful to construct * * * any bridge, dam, dike or causeway over or in any * * * navigable river or other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. * * *"

Respondents, of course, have not constructed their railroad embankments, telegraph lines, etc., in any navigable waterway of the United States.

The material portion of Section 10 relied upon by petitioner is as follows:

> "Section 10. That the creation of any *obstruction* not affirmatively authorized by Congress to the *navigable capacity* of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build * * * structures in any * * * navigable river, or other *water of the United States,* outside established harbor lines, or where no harbor lines have been estab-

> lished except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to * * * fill, or in any manner to alter or modify the course, location, condition or capacity * * * the *channel* of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

As previously pointed out, the railroad embankments and the structures in and on same do not constitute *obstructions* to the *navigable capacity* of the Mississippi River (see R. 135-137). The course, location, condition or capacity of the *channel* of the Mississippi River has not been changed by the embankments, etc., of the respondents.

The construction of the wing dams clearly indicated an intention on the part of the Government to maintain the navigable channel of the river at a point a long distance away from the railroad embankments (R. 179, 125, 121).

Major Riche, in 1909, definitely found there was nothing in the railroad plan of double tracks which was prejudicial to the interests of navigation (R. 151, 149). Apparently, Major Du Shane and Captain Thompson, engineers for the Government in 1909, also "thought there would be no objection whatever on the part of the Government" (R. 148) to the railroad's proposed double-tracking in 1910.

The navigable channel of the river between the ends of the wing dams, on opposite shores, was from 550 to 625 feet (Rd. Ex. 1, Appendix VI). House Document No. 290 shows the section of the river including the portion here involved to have an average width of 600 feet and a minimum width of 400 feet between the ends of the wing dams (Appendix V).

At the trial, counsel for the Government contended Section 9 and Section 10, referred to, relieved the Government

from the payment of compensation for the flooding of respondents' property. Counsel for the Government contended the railroad embankments were financial obstructions to navigation if the Government was required to pay compensation for the loss sustained (R. 135-137). In this regard, the Trial Court said:

> "Well, I can't see that. It has been the rule in all of the cases that the riparian owner can build down to low water mark, subject, of course, to the right of the Government to raise the waters, if your rule is right, to high water mark, and this would not interfere with the raising of it to high water mark. It only interferes with their raising it above high water mark" (R. 138).

In this connection, the Trial Court called attention to the fact that no damage would result to respondents by the mere raising of the water to ordinary high water mark (R. 138). In brief, the Government's claim was that while the railroad structures between low and ordinary high water mark did not interfere with or affect navigation, nevertheless, such structures were obstructions to such navigation if and only if the Government was compelled to compensate the riparian owner for such property.

We submit this is not the test as to the obligation of the Government or the rights of the respondents.

Respondents' embankments certainly were not constructed in the bed of the river. With reference to the bed of a river, the Century Dictionary and Encyclopedia states:

> "River bed—the channel in which a river flows."

The word channel is defined as follows:

> "(1) Channel—bed of a stream; hollow or course in which a stream flows. (2) the deeper part of a river

* * * where the current flows or which is most convenient for the track of a ship."

In *In Re Petition of Schaller*, 193 Minn. 604, 612, the Court indicates a difference exists in the meaning of the term "shore line" as applied to tidal waters and fresh water rivers. As to fresh water rivers, "shore line" is defined:

> "This term has usually been used to mean, in natural fresh water rivers, low water mark and grants bounded by the shore extend to that line, making the water's edge at low water the boundary."
>
> See also *Paine Lumber Co. vs. United States*, 55 Fed. 854, 864.

Cases Relied Upon by Petitioner Are Not in Point.

The misleading cross-section appearing as an appendix to the petitioner's brief gives the erroneous impression that the railroad embankments are located in the channel of the river.

In Wabasha County, the railroad in the claimed encroachment area is on the bank of the river as indicated in Appendix IV.

In Winona County, the railroad, in encroachment area I, is landward from but near the Minnesota bank of the river (Appendix I). Area II is about 1,400 feet from the channel of the river (Appendix II), and area III is about 2,000 feet from the channel of the river (Appendix III) (see also Appendix VI).

It should be kept in mind that the availability of the property of a riparian owner between low and ordinary high water marks on a tidal water is very different from the availability of land so located on a navigable inland river. On the Mississippi River, portions of the land between low and

ordinary high water elevations could at certain short periods of the year be made available for navigation of canoes, rowboats and duckboats if the willows, brush, trees and other vegetation were cleared from such area. Such areas, however, have no practical usability as a highway of interstate commerce, and the petitioner does not now propose to use such land for commerce or navigation. On the other hand, in tidal waters, as brought out in the *Willink* case, *infra* (cited on p. 31 of petitioner's brief), the low and ordinary high water levels are constantly changing by the tides and the area between said elevations is available for substantial commerce during some periods of each day. On tidal water, between low and ordinary high water, the action of the water is so frequent as to destroy all vegetation thereon and practically all use thereof except for boating, bathing, etc. On inland waterways, the areas between low and ordinary high water elevations contended for by the Government have vegetation, grasses and trees and the horizontal distance between the two elevations may be hundreds or even thousands of feet.

Respondents are of the same view as that expressed by the Circuit Court of Appeals (R. 197-198) that the Lynah and Cress cases are controlling in the instant case.

In the Lynah case, the land between low and ordinary high water marks was used as a rice plantation. In the instant case a portion of such land was used as the main line of a railroad and telegraph company. Other customary uses made of such lands are highways, summer cottages, hunting shacks, commercial fish ponds, firewood, grazing lands, etc. Large areas have been condemned by the United States for game refuges. Such bottom lands are particularly suitable to railroad tracks because of the usual gradual river gradients. This Court, in the Lynah case, considered and dis-

cussed three of the cases now relied upon by the Government, to-wit:

Scranton vs. Wheeler, 179 U. S. 141.
Gibson vs. U. S., 166 U. S. 269.
Mills vs. U. S., 46 Fed. 738.

Therefore, a further discussion of said cases would seem to be unnecessary.

The petitioner, apparently, is of the view that the Lynah case should be re-examined by this Court, asserting same to be inconsistent with such cases as:

Philadelphia Co. vs. Stimson, 223 U. S. 605.
Willink vs. U. S., 240 U. S. 572.
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 276.

The Lynah case has, of course, been cited by this Court in many decisions subsequent to the decisions in the cases just mentioned. For example, see:

Jacobs vs. U. S., 290 U. S. 13, 27.
U. S. vs. Cress, 243 U. S. 316, 326.
Hurley vs. Kincaid, 285 U. S. 95, 104.

The Circuit Court of Appeals (R. 196-197) brings out distinguishing features. Special attention is also called to the following in said opinion (R. 196):

> "It is interesting to note that in the Cress case, at pages 320-321 of 243 U. S., the Supreme Court cites *Greenleaf-Johnson Lumber Co. vs. Garrison, supra; Philadelphia Co. vs. Stimson, supra,* and *Willink vs. United States, supra,* in support of the general rule 'that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public

> right of navigation, and the Government control and regulation necessary to give effect to that right'; and then points out that 'it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures'; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

The structures for which Willink claimed damages were within the harbor limits of a navigable tidal waterway. The structures were held to be obstructions to navigation. They were located at a point where the tidal water was navigable not only for smaller but also for larger vessels at high tide. The Government threatened to take the property, changed its plans and, in fact, did not take the property. The case did not involve damages caused by artificially raised water levels.

In *Greenleaf-Johnson Lbr. Co. vs. Garrison, supra,* in quoting from the Stimson case, *supra,* on page 262, this Court said:

> "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation."

The Garrison case also involved structures in a navigable tidal water. The Government proposed to dredge the portion of the waterway where said structures were located. The structures were within the harbor lines and were actual

obstructions to navigation. The case did not involve the artificial raising of the water levels.

This Court, on page 262 of the Garrison case, distinguishes *Yates vs. City of Milwaukee, supra,* as follows:

> "* * * There was no proof in the record that the wharf involved was in fact an obstruction to navigation * * *"

There was no such proof in the instant case. On the contrary, the railroad embankments, as previously pointed out, have been aids to navigation.

In *United States vs. Chandler-Dunbar Water Pwr. Co., et al.,* 229 U. S. 53, 33 S. Ct. 667, 673, Congress by act had determined that the whole river between the American bank and the International line, etc., was necessary for the purposes of navigation. Attention is called to the fact that compensation was awarded under finding of fact No. 45 of the Trial Court in the case for parcels 95 and 96, same being filled in land used as a wharf on deep water.

On page 19 of petitioner's brief, it is suggested the Lynah case has been repudiated by *Jenkins vs. United States,* 60 Ct. Cls. 23. The Lynah case is cited with approval at page 27 of this case. The Jenkins case is to be distinguished. In that case, an alluvial elevation of the bed of the river known as a batture or sandbar was destroyed by reason of dredging the channel, and wasting materials nearby to protect the river banks. At a certain stage of the river, there would be 21 feet of water over the high point of the batture or sandbar in question. On page 27, the Court said:

> "Apparently it was assumed that the right existed to dredge the channel and if, in so doing, the batture was destroyed in the interest of deepening the river, the plaintiff would be without remedy" (p. 27).
>
> "If the right to dredge is conceded, it is difficult to

perceive just how the right to utilize dredge material, especially if it is to be used for the improvement of navigation, converts the transaction into a taking of private property. * * * It was not alone the deepening of the channel with which the Commission was concerned, but incidental thereto and as a part thereof was the necessity of preserving the banks intact, preventing erosion and maintaining natural conditions."

In *Jenkins vs. United States*, 273 U. S. 649, this Court sustained the decision of the Court of Claims in a per curiam decision, citing in support thereof five cases, all of which were brought under the Tucker Act. Two of said cases cite with approval both the Lynah and Cress cases.[11]

In *Marret, Adm., et al., vs. United States*, 82 Ct. Cls. 1, relied upon by petitioner, it appears plaintiff's pleasure resort located on the edge of the bank of the Ohio River was damaged by the raising of the waters of said river above Dam No. 41. The bank of the river at the point in question was steep, rising abruptly 20 feet above the sand beach, which gradually sloped therefrom into the river. On the river side, the building rested on a series of concrete piers. The resort continued to be used but a claim of $67,203.00 for loss of bathing beach, decreased market value, destruction of trees and loss of business was made. The Court said: "The proof as to these losses is not satisfactory." The Cress case is cited with approval. The Court of Claims held the damage was sustained in the bed of the river and same did not constitute a taking.

The Marret case involved structures located in a well-defined channel with a steep embankment extending down

---

[11]Tempel vs. United States, 248 U. S. 121, 129.
United States vs. N. A. T. & T. Co., 253 U. S. 330.

into the river. In the instant case, in Wabasha County, the railroad embankment slopes down to the river but no structure is set on piers over a portion of the river. In Winona County, particularly areas II and III, there are very gradual slopes and a large body of land above ordinary high water mark intervening between the river and respondents' property, said land being covered by large, useful timber, grasses, etc.

This Court, without opinion, respectively denied a petition for writ of certiorari and a rehearing thereon:

A. M. Marret, Adm., et al., vs. United States, 299 U. S. 545.

A. M. Marret, Adm., et al., vs. United States, 299 U. S. 620.

A somewhat similar case is *Hood vs. United States,* 47 Ct. Cls. 669. In that case, plaintiff built a mill under State authority on the banks of the Monongahela River. "The original bank of the Monongahela River intersects the mill at a point nearer the land side of the mill than the water side * * * practically the whole side of the building projecting over the bank into the bed of the river" (p. 670). Most of the foundation of the building was resting in the water. The photographs contained in the opinion clearly distinguish the Hood case from the instant case.

The case of *Port of Seattle vs. Oregon & W. R. Co., et al.,* 255 U. S. 56, 41 S. Ct. 237, also relied upon by petitioner, is not in point. Among other reasons:

> "Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere), a conveyance by the State of uplands abutting upon a natural navigable waterway grants no right of any kind, either in land below high water mark * * *" (p. 240).

If, under the State law, the riparian owner has no title to property below ordinary high water mark, a flooding of such property does not constitute a taking. In Minnesota, the riparian owner has fee title to low water mark.

In *United States vs. Meyer, et al.* (C. C. A. 7), 113 F. (2d) 387, relied upon by petitioner. On page 398, of said decision, it is stated:

> "It is insisted that the Court erred in instructing the jury that for damages caused by raising the water of the river *to the ordinary high water mark,* the Government was not liable. There is no taking from a riparian owner by the Government when water is raised *to the* ordinary high water mark for the purpose of *improving navigation;* * * *"

It is true some of the language used by the Court is broader than necessary for a determination of the case.

In the instant case, it should be kept in mind that in Winona County in the three claimed encroachment areas (Appendix I, II and III hereof), Dam No. 5 raised the water levels from 6.9 feet to 7.5 feet above ordinary high water elevation and in the claimed encroachment area in Wabasha County artificially raised the water levels 5.6 feet above ordinary high water elevation. It should also be kept in mind, in the instant case, the Government's attorneys conceded "that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark" (R. 146).

In the Lynah case, as shown in the quotation on page 21 of petitioner's brief, this Court distinguishes the case of *Mills vs. United States,* 46 Fed. 738 (S. D. Ga.), apparently, on the ground that in the Lynah case the rice plantation was

totally destroyed whereas in the Mills case the rice plantation was not destroyed but it was necessary to provide new drainage and to raise the levees used to protect the rice fields at high water. In more recent years, the decisions make it clear property need not be totally destroyed in order to constitute a taking. A partial destruction or more frequent overflow is sufficient.[12] On pages 10, 13 and 14, petitioner cites and relies upon four opinions of the Attorney General, to-wit: 16 Op. A. G. 479 (1880); 16 Op. A. G. 534 (1880); 17 Op. A. G. 109 (1881); and 18 Op. A. G. 64 (1884).

It is significant that all four of the aforementioned opinions concerning the right of a riparian owner to recover for the destruction by the Government of property between low and ordinary high water marks were written 7 or more years prior to the decisions of this Court in the Lynah case (Feb. 23, 1903) and long before the decision in the Cress case (Mar. 12, 1917).

A brief summary of our view of some of the other cases relied upon by the Government may be helpful.

1. We do not claim the Government cannot deepen the channel of a navigable waterway.[13]

---

[12]United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134.
United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161.
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34.
Jacobs vs. United States, 290 U. S. 13.
United States vs. Cress, 243 U. S. 360.
Pumpelly vs. Green Bay & Miss. Canal Co., 13 Wall. 166, 20 U. S. S. Ct. 557, 561.

[13]Lewis Blue Point Oyster Co. vs. Briggs, 229 U. S. 82.
West Chicago Rd. vs. Chicago, 201 U. S. 506.
Jenkins vs. U. S., 60 Ct. Cls. 23.
Jenkins vs. U. S., 273 U. S. 649.

2. We do not claim the Government may not, in a proper case, improve and restrict the navigable channel and thereby take the waterway from the riparian owner in aid of navigation by cutting off his access to the river.

Gibson vs. United States, 166 U. S. 269.

3. We concede the burden is upon the land owner to prove the Government structures will in fact cause his property to be overflowed. Speculation and conjecture that such property may be damaged is not enough.

Sanguinetti vs. United States, 264 U. S. 146, 149.

4. We concede a land owner is not entitled to an injunction to enjoin the damming of a waterway, even though such land owner will be overflowed to a minor extent, and this is particularly true where a reasonable provision is made to pay lawful compensation.

Manigault vs. Springs, 199 U. S. 473, 487.

5. To recover, we concede there must be an actual invasion of claimant's land. A Government operation six miles upstream from claimant's land that did not involve invasion of any part of his land is not sufficient.

Bedford vs. United States, 192 U. S. 217, 225.

6. The United States is not responsible to riparian owners for consequential damages from the mere deflection of water by reason of structures lawfully constructed in aid of navigation.[14]

7. We do not deny that structures placed between low

---

[14] Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 263.
W. A. Ross Constr. Co. vs. Yearsley (C. C. A. 8), 103 F. (2d) 589, 592.
The case of W. A. Ross Construction Co. vs. Yearsley, supra, on page 592, distinguishes the Lynah and Cress cases.

and ordinary high water elevations on tidal waters where such area is in fact useful to actual navigation when the tide is in may be removed as an actual obstruction to navigation.[15]

8. We admit property owners cannot obstruct the channel of an inland navigable river in its natural state and if such property owner does so obstruct the channel, he owes the uncompensated duty to remove the obstruction, particularly where Congress has held the portion of the river where the obstruction exists is necessary for navigation.[16]

9. But we do claim the Government cannot by the construction of a dam, artificially raise the water levels and take the property of a riparian owner between low and ordinary high water marks or substantially impair the usefulness of such property whether same be a rice plantation, farm, a railroad or telegraph line without compensating the owner under the Fifth Amendment.

United States vs. Cress, 243 U. S. 316.
United States vs. Lynah, 188 U. S. 445.

10. We do claim the servitude of private lands to navigation is confined to the natural widths, levels and flows of the river. If more is taken, the Government must compensate the owner for such taking.[17]

---

[15] **Willink vs. U. S.**, 240 U. S. 572.
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251.

[16] **United States vs. Chandler-Dunbar Co.**, 229 U. S. 53, 33 S. Ct. 667.
West Chgo. R. vs. Chicago, 201 U. S. 506.
Union Bridge Co. vs. U. S., 204 U. S. 364.

[17] **U. S. vs. C., B. & Q. Rd. Co.** (C. C. A. 8), 82 F. (2d) 131, 134, writ denied 298 U. S. 134.
U. S. vs. Cress, 243 U. S. 316, 332.
U. S. vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
U. S. vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, 984, and other cases cited.

11. We do claim where a riparian owner under local law has title to property beyond low water mark and such property does not obstruct or interfere with navigation, the Government cannot take such property without compensating the owner therefor.[18]

12. We do claim the riprapped railroad embankments from 1910 to 1934 were an aid to navigation in that same prevented a cutting away of the shore line. That the Government has had the benefit of such property in the transportation of the United States mail. That both the State and Federal Governments have received annually substantial sums of money in the form of taxes upon the railroad, including portions of same here involved and the doctrine of equitable estoppel is applicable as against the petitioner.[19]

The Court Properly Denied Motion of the United States, Made at the Close of the Testimony, to Dismiss From the Proceeding the Portion of the Property Claimed to Be an Encroachment in the Mississippi River.

(Assignment of Error No. 13.)

This assignment of error was abandoned by the Government's attorney on oral argument before the Circuit Court of Appeals but, inasmuch as the motion to dismiss is referred to on page 5 of petitioner's brief, it may be wise to briefly refer to this motion.

The motion was not made timely. The Government is the

---

18 Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Nav. Co. vs. U. S., 148 U. S. 312.

19 State vs. Carr (C. C. A. 8), 191 Fed. 257.
Monongahela Nav. Co. vs. U. S., 148 U. S. 312.
Walker vs. U. S., 139 Fed. 409, 413.

same as any other litigant when it brings an action.[20]

The Trial Court, in denying the motion to dismiss, stated rather fully his reasons for so doing (R. 154). It should be kept in mind that at the time this motion was made, hearing had been held before the Commissioners and award made to the respondents. Appeal had been taken to the District Court. Immediate possession of the property, including the four segments involved, had been ordered by the Court and taken by the petitioners. The water had been artificially raised against the embankment and through the railroad's bridges and culverts to the pool level. The Railroad and Telegraph Companies had taken measures to protect their property against the new artificial water levels and, in so doing, had expended large sums of money. The trial on the appeal had been completed so far as the taking of the testimony was concerned. During the trial, the petitioners had submitted to the Trial Court the question as to whether or not the respondents were entitled to recover compensation for the taking of their property in the four segments here involved. It was only after an adverse ruling had been made by the Trial Court that the Government decided and tried to dismiss the segments in question from the proceeding.

We submit the Government is the same as any other litigant before the Court and could not, after such adverse rulings and expenditures of money by the respondents, dismiss the property involved in this appeal from the proceeding.

See 20 *C. J.*, Section 458, at page 1082.

---

[20] **Mountain Copper Co. vs. United States** (C. C. A. 9), 142 Fed. 625.
United States vs. Barber Lbr. Co. (C. C., Ida., C. D.), 169 Fed. 184, 187, 188.
United States vs. James Stinson, et al., 197 U. S. 200, 207.
The Steamer Siren and Cargo, etc., vs. United States, 74 U. S. 152, 165.

CONCLUSION

It is true the principles here involved are important to the Federal Government, to the Railroad, Telegraph and Telephone Companies whose lines are located on the bottom lands of the Mississippi River and many other inland streams, and also to state and local authorities maintaining roads and highways, as well as to the much larger group of riparian owners who use such bottom lands for grazing, hay, woodlots, rice cultivation, artificial fish ponds, piers, wharves and embankments to reach the navigable channel of such rivers.

As to the Judgment for Lands Taken in Winona County.

The Government's offer to prove the respondents' structures in 1910 were constructed between low and ordinary high water mark was immaterial as no offer was made to prove such condition existed in 1933 when condemnation proceedings were commenced or on August 4, 1934, when immediate possession was taken. The Government failed to prove Walters Creek adjacent to claimed encroachment areas II and III was a navigable waterway of the United States, although permitted so to do by stipulation of the parties (R. 145, 147).

As to the Judgment for Lands Taken in Both Winona and Wabasha Counties.

The respondents conceded their embankments in Wabasha County were between low and ordinary high water elevations of the river and if we assume (contrary to the fact) that the same situation existed in the claimed encroachment areas in Winona County, the offer of proof was immaterial

because it is, without dispute, shown that no portion of respondents' property or structures invaded the navigable channel of the river and did not obstruct or interfere with navigation therein (R. 135-138).

Under such circumstances, this Court has held riparian owners are entitled to compensation from the United States where the use of their property located between low and ordinary high water marks is destroyed or the use thereof substantially impaired.[21]

The servitude of respondents' property to navigation is confined to the natural widths, levels and flows of the river, whereas all of the damage here involved and the compensation awarded respondents therefor was due solely to the artificial raising of the Mississippi River water levels by the Government to a point in excess of ordinary high water mark.[22]

---

[21] United States vs. Lynah, 188 U. S. 445.
Williams, et al., vs. United States, 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9.
United States vs. King, 164 U. S. 703.
Heyward vs. United States, 46 Ct. Cls. 484, 52 Ct. Cls. 87.
United States vs. Heyward, 250 U. S. 633.
Lowndes, et al., vs. United States, 105 Fed. 838.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 853.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Jacobs vs. United States, 290 U. S. 13, 16.

[22] United States vs. Cress, 243 U. S. 316, 319.
Jacobs vs. United States, 290 U. S. 13, 16.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ denied, United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Weaver vs. Miss. & Rum River Boom Co., 28 Minn. 534, 538.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, 984.

The Trial Court properly denied the motion of the United States made at the close of all the testimony to dismiss from these proceedings the property involved here. Such motion was not made timely.

We respectfully submit the Circuit Court of Appeals for the Eighth Circuit properly affirmed the judgments of the United States District Court, District of Minnesota, First Division, in the proceedings involving property of respondents in both Winona and Wabasha Counties.

F. W. Root,
A. C. Erdall,
C. O. Newcomb,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. Whitlock,
C. S. Jefferson,
Chicago, Ill.

ILLUSTRATIVE CROSS-SECTIONS I, II, III AND IV

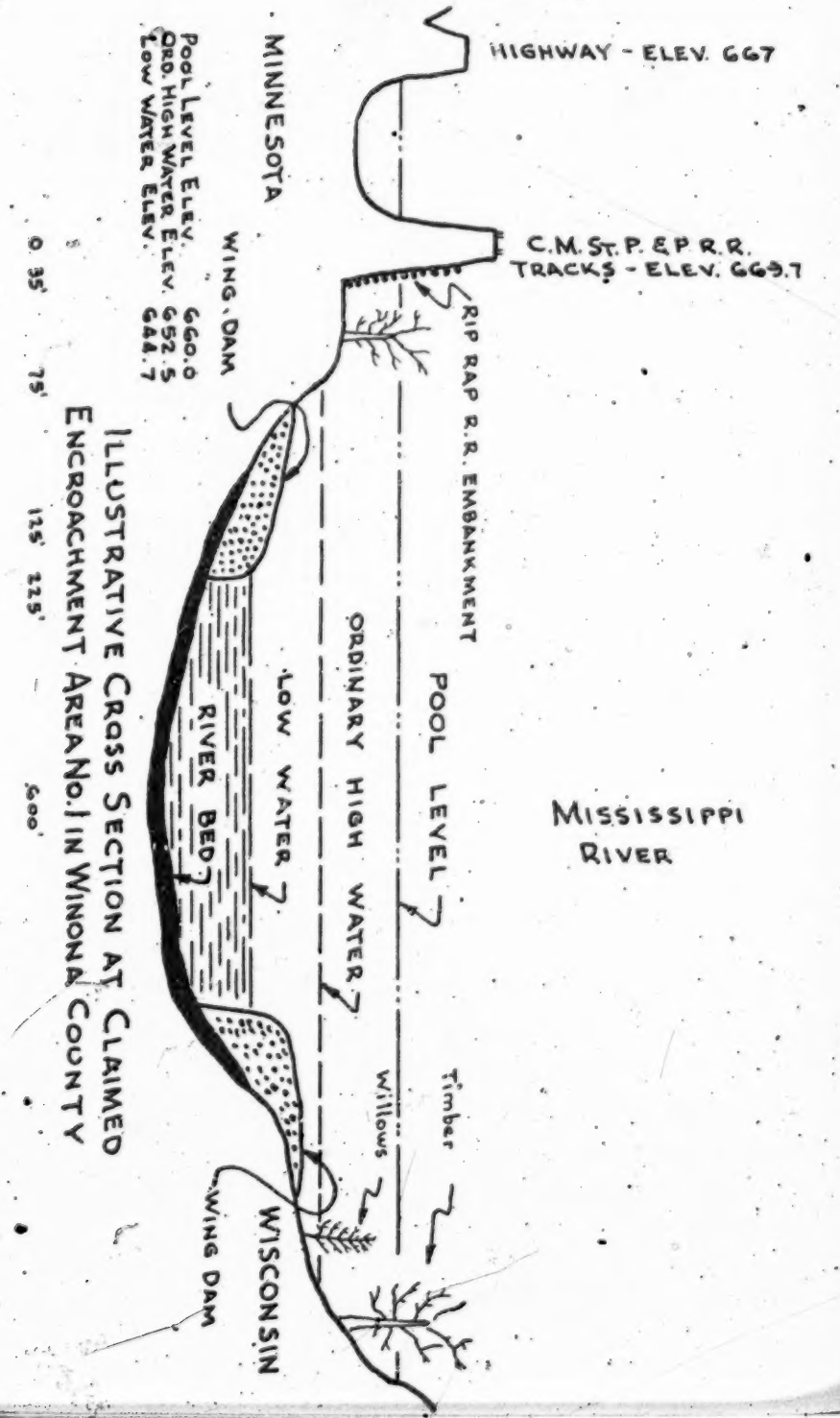
Appendix I—Claimed encroachment area I, Winona County, is adjacent to the Minnesota shore of the Mississippi River. The vertical distances have been exaggerated about ten times over horizontal distances so as to include all of the area on one page.

Appendices II, III—Respectively show claimed encroachment areas II and III in Winona County. The railroad in each of these areas is adjacent to Walters Creek. On each of the illustrations, the channel of the river is such a great distance from the railroad tracks that it was necessary to exaggerate the vertical distances over the horizontal distances respectively thirty and twenty-five times.

Appendix IV—Illustrates claimed encroachment area in Wabasha County in the Minneiska Station grounds. Here the railroad is also adjacent to the Minnesota shore of the Mississippi River. Vertical distances are exaggerated ten to twelve times over horizontal distances.

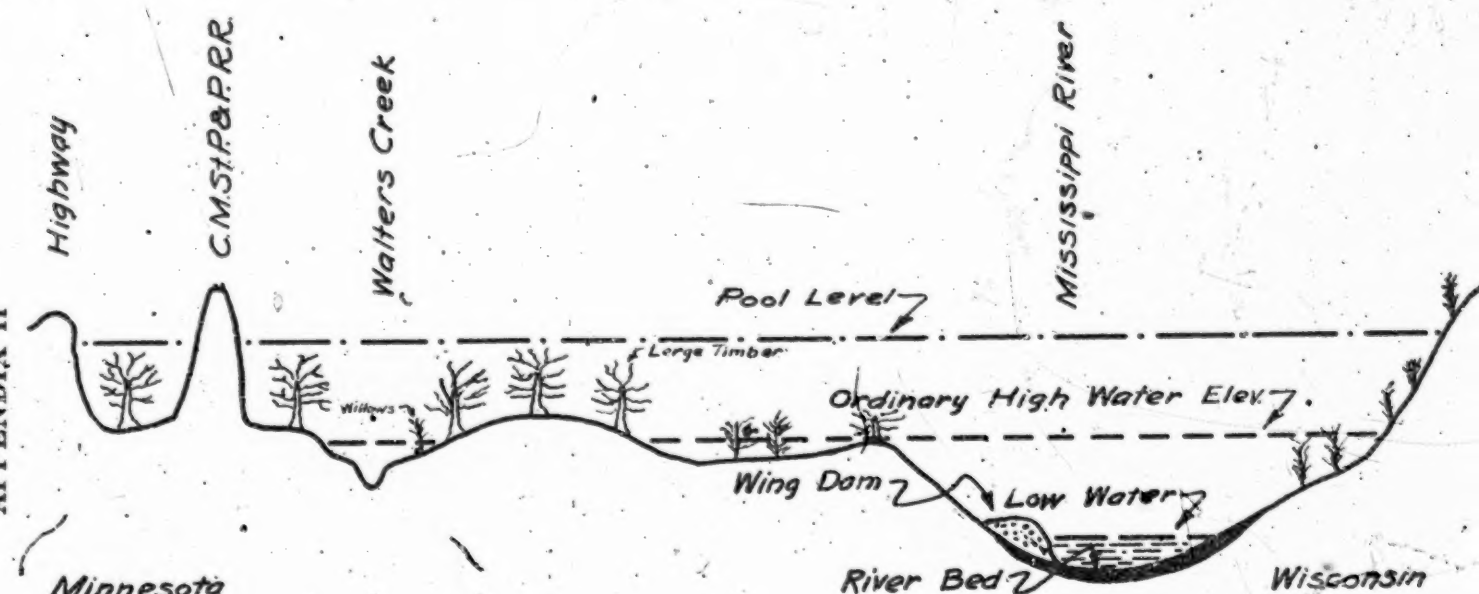
Each one of the four cross-sections shows the low and ordinary high water elevations in each area. The approximate distances the wing dams extend out from the railroad embankment, the river bed under the low water channel and the horizontal distance from the railroad tracks to ordinary high water mark, to the river end of the wing dam, to low water mark and to the center of the river are also shown. Each cross-section represents the average condition in each of the areas. They each show a representative wing dam, water surface at low water, at ordinary high water and at normal pool level of 660. Also, they show general location of large timber as well as general location of willows.

APPENDIX I



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No. 1 IN WINONA COUNTY

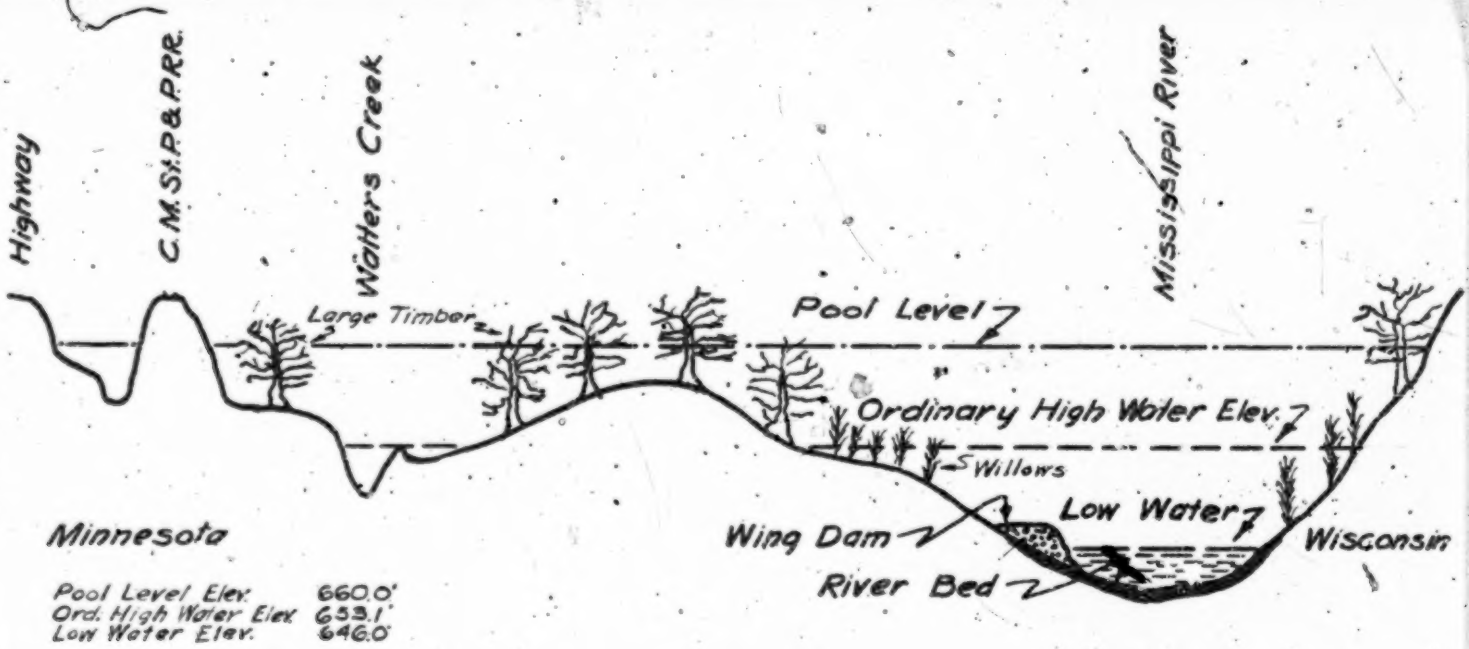
APPENDIX II



Pool Level Elev.	660.0
Ord. High Water Elev	652.9
Low Water Elev.	645.2

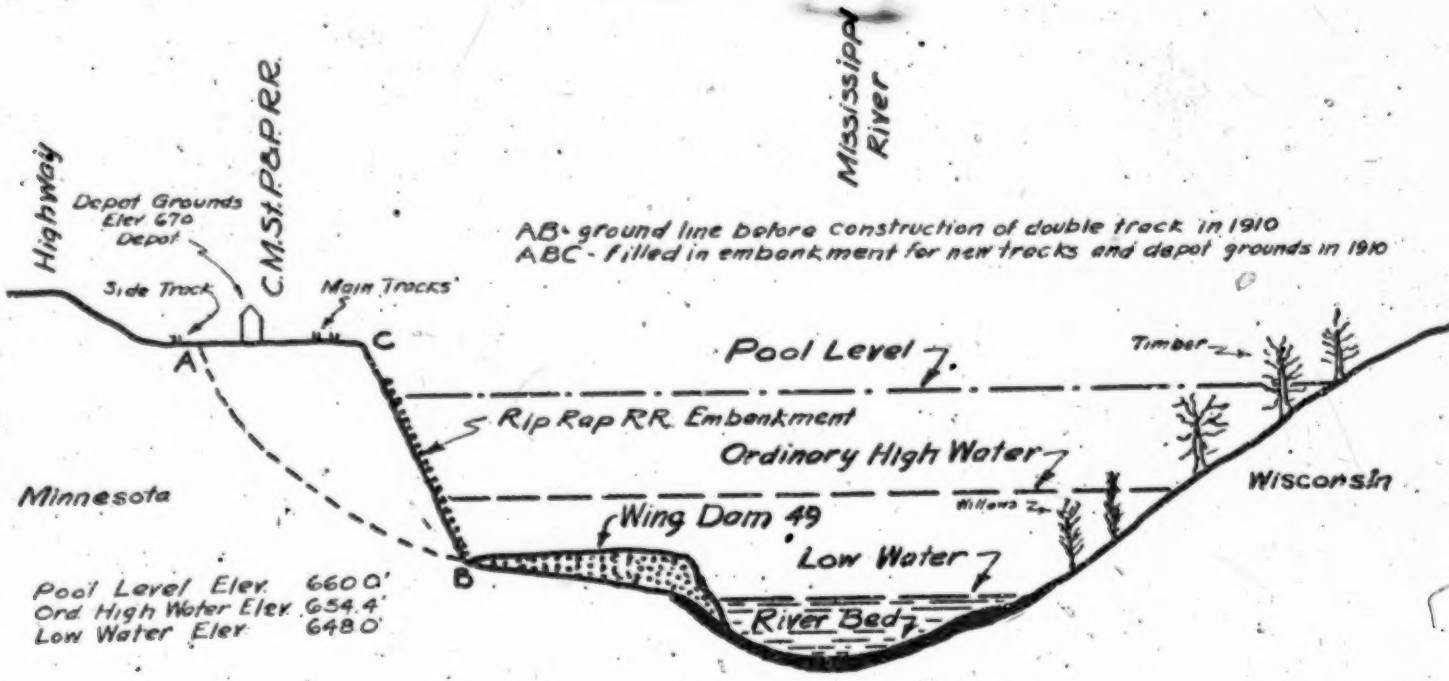
ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No. II IN WINONA COUNTY

0 100' 700' 1400' 2100' 2400'



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No III IN WINONA COUNTY

0 200 1800 2000 2600



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA IN WABASHA COUNTY

APPENDIX V

Excerpts from House Document No. 290, 71st Congress, 2nd Session:

"Letter from the Secretary of War Transmitting report from the chief of engineers on a partial survey of Mississippi River, between mouth of Missouri River and Minneapolis, with a view to securing a channel depth of 9 feet at low water, with suitable widths" (p. 1).

"The Board of Engineers for Rivers and Harbors,
Washington, D. C., January 22, 1930.

To the Chief of Engineers, United States Army:

1. The following is in review of the report on a partial survey authorized by the river and harbor act approved January 21, 1927, of the 'Mississippi River between Missouri River and Minneapolis, *with a view to securing a channel depth of 9 feet at low water, with suitable widths.*' A final report will be submitted after completion of the survey now in progress, which is expected to require about 12 months' additional time.

* * *

5. * * * Natural conditions are not particularly favorable to the construction of locks and dams. The valley is wide and flat, with numerous villages and small cities elevated not far above ordinary high water. *Railroad following the river are at many points just above high water,* and at the larger river cities, industrial developments line the stream closely. *It is considered therefore that in general low dams must be used, many of them built on pile foundations* on a sand, gravel and silt bed. High dams would require very long spillways with movable crests.

6. A plan is submitted by the special board, based upon the incomplete information now available. All of the works are adaptable to an ultimate 9-foot project.

Some are recommended for immediate construction to better conditions under the 6-foot project. *The balance form part of a comprehensive project for a channel 9 feet deep.* To assure a satisfactory 6-foot channel, it is stated that immediate dredging should be undertaken at the upper end of the Twin City Pool and for about 5 miles below the Twin City Dam. Reconstruction of the Twin City Lock, necessitated by failure of the lower gates and sill, is now under way. It is proposed to construct a parallel lock of the same dimensions (56 by 360), so as to provide 2-way traffic through this high-lift dam. Between the Hastings Dam and the mouth of the Wisconsin River, the construction of locks and dams is recommended. * * * It is stated that no project should be adopted which will make the erection of any specified type of dams mandatory before the accumulation of more complete data. *These dams would provide a 9-foot depth in the section of the river canalized.* * * *"*

"304. Lake Pepin to Genoa (86.5) miles.—(a) *This section of the river has an average width of 600 feet from ends of the wing dams to the opposite shore, and a minimum width of 400 feet.* * * *"*

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1940.

The United States of America, Petitioner, *vs.* The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 31, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The question for decision is whether the United States must compensate a riparian owner for injury to structures located between high and low water marks, where the damage is caused by the raising of the water level in a navigable stream for the improvement of navigation. The importance of the question, and a conflict in the decisions of this court, led to the grant of certiorari.

The tracks of the respondent railroad and the pole lines of the respondent telegraph company in Wabasha and Winona counties, Minnesota, as relocated in 1910, are, in part, on an embankment on the westerly side of the Mississippi River. The embankment was adequately riprapped, where necessary, to protect it in times of high water.

In the prosecution of a project for the improvement of navigation the United States has been, and is, engaged in constructing a series of locks and dams in the upper reaches of the Mississippi. One of the dams authorized by Act of Congress[1] raises the level of the river and creates a pool which inundates bottom lands along the west bank.

In 1933 the Government instituted condemnation proceedings to acquire the right to back water across the respondents' right of way and against their embankment. Since the dam raises the water level from 5.6 to 7.5 feet above ordinary high water mark, the respondents were compelled at certain points to add additional riprap to prevent damage to their embankment.

[1] Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 927.

At the trial in the condemnation proceeding the Government offered to prove that four segments of the embankment lie between the ordinary high and ordinary low water marks of the river; are, therefore, subject to the federal power to improve navigation; and that any injury to them by additional flooding is an incident of the exercise of the power and not the subject of compensation. The respondents objected to the offer as immaterial for the reason that neither before nor after the improvement did the embankment constitute an obstruction or menace to navigation and its maintenance was and is, therefore, a right of private property, the injury to which, in the prosecution of the federal project, entitled the owner to compensation.

The District Court rejected the offer of proof. Thereupon the Government moved to dismiss from the proceedings all question of compensation for the four encroachment areas where the embankment was claimed to be located between high and low water marks. The motion was denied. A verdict and judgment ensued for damages to the entire length of the embankment both where it was admitted to be located on fast land and where it was claimed to lie between high and low water marks. Each party appealed. Thereafter, by stipulation, all questions, except that touching the four segments of the embankment which the Government claimed were located between high and low water marks, were eliminated from the cause. It was stipulated by the respondents that one of the four segments in question was so located, but as to the other three the parties are in disagreement. The Court of Appeals, for the purpose of decision, assumed that all four were so located but held, nevertheless, that the Government was bound to compensate the respondents for damage to all of them, and affirmed the judgment of the District Court.[2]

Certain matters are not in dispute. The Mississippi River at the points in question is navigable. The respondent railroad is the riparian owner and, as such, its title extends to ordinary low water mark. The natural channel and the course of navigation through the pool formed by the dam lie at a considerable distance from the embankment which does not, and will not, obstruct or interfere with actual navigation. The lands lying between the embankment and the natural channel were low lands which, prior to the improvement, were to a great extent covered with trees and scrub.

---

[2] 113 F. (2d) 919.

The respondents assert that the power of the Government to take private lands for the improvement of navigation is confined to the natural widths, levels, and flows of the river and that if more is taken compensation must be made. Their position is that the embankment can be injured without compensation only if it constitutes an encroachment and thus a hindrance or obstruction to actual navigation. The Government, on the other hand, insists that its power is not confined to the mere making or clearing of channels and removing hindrances and obstructions to their navigation, but embraces the exercise of every appropriate means for the improvement of navigable capacity and that, in the provision of any such means, it is entitled to deal with and alter the level of the stream to any extent up to ordinary high water mark without being answerable to riparian owners for injury to structures lying below that line.

Commerce, the regulation of which between the states is committed by the Constitution to Congress, includes navigation. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."[3] And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone.[4] Whether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or, as in this case, to low water mark,[5] the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.[6]

The power of Congress extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions located by the riparian owner, or others, but comprehends as well the power to improve and enlarge their navigability.[7]

---

[3] Gilman *v.* Philadelphia, 3 Wall. 713, 724.

[4] Scranton *v.* Wheeler, 179 U. S. 141, 162.

[5] Morrill *v.* St. Anthony Falls Water Pr. Co., 26 Minn. 222, 2 N. W. 842.

[6] Gibson *v.* United States, 166 U. S. 269, 271, 272.

[7] United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 62; New Jersey *v.* Sargent, 269 U. S. 328, 337; United States *v.* Appalachian Electric Power Co., No. 12, October Term, 1940.

The bed of a river is "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."[8]

The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation.[9] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

The respondents admit that this is the settled rule but insist that it has been applied only in cases where the control of the Government was exercised to extend the area of practicable navigation either by constructing channels for actual use or by removing obstructions to navigation. They assert, and the court below was of opinion, that *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, sanction a different principle where the improvement consists in the raising of the level of a stream to the injury of structures erected by the riparian owner between high and low water mark.

What was said in the *Cress* case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiffs' land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

In the *Lynah* case the plaintiff's rice plantation was rendered worthless by the Government's raising the water in the Savannah River. Three questions were considered at length by this

[8] Alabama *v.* Georgia, 23 How. 505, 515.

[9] Scranton *v.* Wheeler, 179 U. S. 141, 143, 144; Greenleaf Lumber Co. *v.* Garrison, 237 U. S. 251, 263; Willink *v.* United States, 240 U. S. 572, 580; Delaware R. Co. *v.* Weeks, 293 Fed. 114, 120; Barr *v.* Spalding, 46 F. (2d) 798, 800; Marret *v.* United States, 82 Ct. Cls. 1, 13; United States *v.* Meyer, 113 F. (2d) 387, 398.

Court: Whether the trial court (the then Circuit Court) had jurisdiction; whether there was a taking of plaintiff's property; and whether the Government was bound to compensate therefor. All were answered in the affirmative. Applying earlier decisions it was held that the permanent flooding of land adjacent to a stream in the improvement of navigation, pursuant to statutory authority, amounted to a taking and that the court had jurisdiction to award compensation upon the footing of an implied contract of the Government to pay for what it took. But as the court below points out, the quoted findings show, and the opinion adverted to the fact, that the plantation lay, in part, between the high and low water lines, and this Court held that the flooding constituted a taking of the whole for which compensation was due under the Fifth Amendment to the Constitution. Moreover, three justices based their dissent largely on the fact that compensation was awarded for injury to lands lying below high water mark. We are bound, therefore, to determine whether we shall follow that decision in respect of the issue involved in the instant case. The decision was by a divided court and later, in a similar case, there was an affirmance by an equally divided court.[10] The case has often been cited as authority for the settled doctrine that an authorized taking of property for public use gives rise to an implied promise to pay just compensation. But we think this Court has never followed it as a binding decision that compensation is due for injury or destruction of a riparian owner's property located in the bed of a navigable stream. And we think that, so far as it sanctions such a principle, it is in irreconcilable conflict with our later decisions[11] and cannot be considered as expressing the law.

It is not true, as respondents maintain, that only structures in the bed of a navigable stream which obstruct or adversely affect navigation may be injured or destroyed without compensation by a federal improvement of navigable capacity. On the contrary, any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed; and the right to compensation does not depend on the absence of physical interference with navigation. The *ratio decidendi* and the circumstances disclosed in numerous cases lead inevitably to this conclusion.[12]

---

[10] United States *v.* Heyward, 250 U. S. 633.

[11] See cases cited in Note 9 *supra.*

[12] See the cases cited in Note 9, and United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 70; Lewis Blue Point Oyster Co. *v.* Briggs, 229 U. S. 82, 86-88.

The respondents claim that two of the sections of embankment in question abut, not on the Mississippi River, but on a non-navigable tributary and that another, though along the bank of the river, is at or above the ordinary high water line. The Government disagrees. These issues of fact remain for solution by the District Court.

The judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

not only are above ordinary high water mark but also claim that they